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LAW REPORTS.

SUPPLEMENTAL

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES,

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DECIDED BETWEEN MARCH, 1872, AND NOVEMBER, 1873,

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REPORTED BY HERBERT COWELL, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON:

Printed for the Incorporated Council of Law Reporting for England and Wales

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1880.

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450.70
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SUPPLEMENTARY CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

RAMALAKSHMI AMMAL . . . . . DEFENDANT;

AND

SIVANANANTHA PERUMAL SETHURAYER PLAINTIFF.

J. C.*

1872

March 14, 15; *April* 20.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Impartible Zemindary—Primogeniture—Seniority according to Birth, and not of Marriage of Wives—Custom.

The rule of succession to an impartible subject, as a raj or office, is generally regulated by some local or family usage, which, however, must be ancient, invariable, and clearly proved; otherwise, the rule of succession must be deduced from settled rules of Hindu law, and the principles on which they are founded.

Such rules are that, 1. The first-born son by reason of his general pre-eminence is preferred to his younger brother; 2. Where the sons are by different mothers of equal caste seniority is according to birth, and not in right of the mother (unless possibly in the case of the first wife) according to priority of marriage.

APPEAL from a decree of the High Court (Feb. 12, 1866) (1), reversing a decree of the Judge of *Tinnevelly* (Aug. 24, 1864). The facts of the case and the authorities referred to in the arguments appear in the judgment of their Lordships.

* *Present:*—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 3 Madras, H. C. R. 75.

J. C.

1872

RAMALAKSHMI AMMAL v. SIVANANTHA PERUMAL SETHURAYER.

Sir *R. Palmer*, Q.C., and *Bowring*, for the Appellant.

Leith and *Grady*, for the Respondent.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from the High Court of *Madras* in a suit raising the question of the right of succession to an impartible zemindary called *Urcadu*, in *Tinnevelly*. The litigants are two sons by different wives of *Kolalinga Sethurayer*, the late zemindar.

Kolalinga Sethurayer, who was a Hindu, married three wives. The first, *Kanthunathi Ammal*, had no child. His other wives were *Ramalakshmi Ammal*, the mother of *Muttee Ramalinga Sethurayer* (the Appellant) and *Vellaithai Perumal Ammal*, the mother of *Sivananantha Perumal Sethurayer* (the Respondent).

Although the mother, *Ramalakshmi*, is Appellant as guardian of her son, it will be convenient to speak of him as the Appellant, and of the other claimant as the Respondent.

The marriages of the two mothers took place on the same day in June, 1836, but at different hours, and the priority in time of these marriages was a subject of contest in the suit.

The Courts in *India* have held that the marriage of the Appellant's mother was first solemnized, and that she, therefore, in order of time, was the second wife, and the Respondent's mother the third wife of the zemindar.

In the view their Lordships take of this case, it is not necessary to consider the correctness of this finding, and they therefore adopt it in dealing with the present appeal.

It appears that at the date of the marriages the Appellant's mother was a child only ten years old, whilst the mother of the Respondent was a girl of sixteen. The Respondent, as might naturally be expected from the relative ages of the mothers, was born many years before the Appellant, and he seeks to recover the zemindary in this suit as the first-born son of the zemindar. The Appellant resists his claim on the ground that he, as the son by the earlier marriage, is the rightful heir. The question is thus raised whether the son of the second wife, although born after the son of the third wife, is entitled to inherit; in other words,

whether the priority in birth of the sons, or the priority in the marriages of their mothers, both being of the same caste, is to prevail in determining the succession to an impartible zemindary in this district of *Madras*.

It appears from the pleadings and issues that the Respondent, the first-born son, relies on the general Hindu law of succession, and on the custom of the family which he affirms to be in accordance with it.

The Appellant alleges that, by the custom of the district he is entitled to the succession, and he also denies that the general Hindu law is in favour of the Respondent's claim.

Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in *India*, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

In the present case their Lordships agree in opinion with the High Court that the Appellant has failed to prove the special custom which he undertook to establish.

It appears from the Record that, in 1861, during the life of their father the late zemindar, the Appellant brought a suit in the Civil Court of *Tinnevelly* against the present Respondent, to have his right to the succession declared. He founded his claim on the usage in his father's zemindary and "other zemindaries." The present Respondent then relied, as he still does, on the general Hindu law, and the usage of the family. The Civil Judge was of opinion that the evidence to support a family usage was insufficient for the purpose, but he thought there was sufficient proof of a usage prevailing amongst the zemindars of the district that the son of the senior wife was to succeed. The decision of this Judge in favour of the present Appellant appears to have been reversed on appeal, on the ground that the suit was not maintainable during the life of the father; but it has been necessary to

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RAMALAKSHMI AMMAL v. SIVANANTHA PERUMAL SETHURAYER.

advert to the suit, because the evidence taken in it has by consent been brought into the present suit, and is the only evidence in it.

This evidence consisted, so far as proof of the family usage went, principally of the testimony of the late zemindar himself, who was a party to the declaratory suit, and, evidently, he is not a trustworthy witness, for whilst in that suit he espoused the cause of the present Appellant, and gave evidence of the family usage in his favour, he had some years before, and after both sons were born, given equally strong evidence of a custom the other way in support of the claim of the present Respondent. It is obvious that the zemindar's testimony was influenced by his partiality for one son or the other at the time of giving it, and is thus entirely untrustworthy. The other evidence is conflicting and wholly insufficient to establish any family custom. Indeed in the present suit both the Courts in *India* have so regarded it.

Then with respect to the usage of the district set up by the Appellant, the only evidence, apart from the conflicting testimony just referred to, which appears on the Record, is a statement of certain declarations alleged to have been made by some zemindars under the following circumstances. In the year 1849 the Board of Revenue acting as the Court of Wards desiring to know which of the two minor sons of the zemindar of *Parayur* was to succeed him, requested the Collector of *Tinnevelly* and *Madura* to ascertain the rule of succession "as regards sons by different wives," and it appears from the Collector's letter to the secretary of the board, that the opinions of twenty zemindars and poligars were collected, copies of which he sent, giving also, at the same time, an abstract of them in his letter. It seems that the Court of Wards acted upon the opinions thus obtained.

The only evidence offered of these opinions was the above letter and abstract of the Collector, and objections were made to its reception in proof of the custom.

Considerable, and perhaps undue, laxity in admitting documents has been sometimes allowed by the Indian Courts; but their Lordships consider that, whilst it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in the Courts in *India*, the substantial principles on

which the authenticity and value of all evidence rest should be observed. One of these principles is that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. There seems to be no reason in this case why the zemindars or some of them might not have been called as witnesses, when, of course, they would have been subject to cross-examination; but not only were none examined, but even their written opinions, as they gave them, were not produced. Their Lordships consider, agreeing with the High Court, that the only evidence offered, viz., the Collector's letter and summary, was not properly admissible, and if received, could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district.

The summary of the Collector (if it may be looked at) discloses that the zemindars were not unanimous in their view of the custom; and it further appears that their opinions were given with reference to the succession to a zemindary in a family of a different caste. The late zemindar, who was one of those vouched, differed from the majority, and declared that the eldest son, although by the junior wife, would succeed. It is true that, for the reasons already given, much reliance cannot be placed on his statement, but, so far as it may be of any value, it negatives the alleged custom, at all events as one prevailing in his own caste and zemindary.

It was insisted by the learned counsel for the Appellant that the fact that the priority of the marriages of the second and third wives was made a question in the declaratory suit and in this suit, and strongly contested, indicated an impression on the minds of the litigants that a custom existed to the effect alleged by the Appellant, for if there were no such custom, the contest as to the priority of the marriages was immaterial. At first sight this seemed to be so. But the inference from it is greatly weakened, if not destroyed, by the consideration that in the declaratory suit brought in the zemindar's lifetime, and to which he was a party, the zemindar himself, contrary to his former view, set up the custom which would give the succession to the Appellant, whom he was then supporting, in opposition to the Respondent, his

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RAMALAKSHMI AMMAL v. SIVANANTHA PERUMAL SETHURAYER.

eldest son. When the father, from whatever motive, put forward this view of the custom, it was natural that the fact of the priority of the marriages should be made a question in the suit as well as the nature of the custom.

The attempt on both sides to prove a special custom having failed, it remains to consider what is the general Hindu law applicable to this disputed succession.

The case stands in this respect in the same category as that in the appeal relating to the zemindary of *Shivagunga*, which was decided by this Board in 1863. Their Lordships, in giving judgment in that appeal, say: "the zemindary is in the nature of a principality, impartible, and capable of enjoyment by only one member of a family at a time; but whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings) the rule of succession to it is now admitted to be that of the general Hindu law prevalent in that part of *India*, with such qualifications only as flow from the impartible character of the subject." Such, also, must be the rule of succession to be applied in the case now under appeal.

The High Court, in their judgment in the present case, declare that "no work of authority or decision" had been cited or found directly giving the rule of descent. That this should be so may, perhaps, be explained by the fact that succession by primogeniture is the rare exception to the ordinary rule in Hindu families, taking place only upon the descent of some impartible subject, as a raj or office, and that in most cases of the kind there has probably been found some local or family usage regulating such descent.

If, however, it really be that the rule of succession is not directly declared in books of authority, or in decided cases, then it must be deduced from those rules which are settled, and the principles on which they are founded.

The learned counsel on both sides referred to various texts with this view; and it appears to their Lordships that many of these supply authority from which the law may, with reasonable certainty, be inferred and declared.

One great rule of religion binding upon every Hindu is the

duty of having a son, not only for the sake of the spiritual benefits he obtains for himself by his birth, but because he thereby discharges the pious debt he owes to his ancestors. And, as a consequence naturally flowing from this law, the first-born son is, throughout the books of authority, treated as pre-eminent amongst his brothers, and held to be entitled to many special privileges.

It will be found, from numerous authorities and instances, that, although the father's property, by the general rule, descends upon all his sons, yet, whenever it becomes necessary to make a distinction, precedence is given to the first-born.

Thus, *Menu*, after laying down the cardinal rule of succession that brothers divide the paternal property among them, adds "the eldest brother may take entire possession of the patrimony; and the others may live under him as they lived under their father, unless they choose to be separated."

"By the eldest, at the moment of his birth, the father having begotten a son, discharges a debt to his own progenitors. The eldest son, therefore, ought, before partition, to manage the whole patrimony" (c. 9, s. 106).

"That son alone, by whose birth alone he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty" (c. 9, s. 107). See also ss. 137, 138.

Many of the precepts of *Menu* have been undoubtedly altered and modified by modern law and usage; but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law. The general doctrines above alluded to are also found in other old authorities, and are treated as part of the foundation of the Hindu law of succession by modern writers and compilers. (See 1 *Strange's* Hindu Law, 192, Col. Dig. Book V.)

It is true that these doctrines occur in passages treating of divisible inheritances; but the presumption from them is irresistible, that in the case of an inheritance which is from its nature indivisible, and can therefore go to one only of several sons, the first-born, by reason of his general pre-eminence, should be preferred to his younger brother.

It was not disputed that this would be so in the case of several sons by the same mother; but it was contended that where there

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were sons by different wives the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the sons by any wives after the first. On the contrary, there is a good deal of authority pointing to the conclusion that there is no distinction, except seniority of birth, amongst the sons of wives of the same caste and class.

Thus *Menu* says, "a younger son being born of a first marriage after an elder son had been born of a wife last married *but of a lower class*, it may be a doubt *in that case* how the division shall be made" (c. 9, s. 123).

The doubt thus suggested whether, even in the case of a wife of a lower class, there would be inequality of division amongst the sons, raises a strong presumption that there would be none where the mothers were of the same class. But the matter does not rest on presumption, for the 125th section runs thus:—

"As between sons born of wives equal in their class, and without any other distinction, there can be no seniority in right of the mother; *but the seniority ordained by law is according to birth.*"

It is true the writer is in this section treating of partible successions, but he is at the same time proclaiming the privileges to which the eldest son is entitled, and one of them he had just declared in a preceding section (119) thus:—

"Let them never divide the value of a single goat or sheep; a single goat or sheep, remaining after an equal distribution, belongs to the first-born."

Now, when it is said that the single goat or sheep is to belong to one son, it is apparently for the same reason that a zemindary so descends, viz., that the subject is in its nature impartible; and, therefore, the rule that is laid down with reference to one impartible subject, viz., that "it belongs to the first-born," appears by reasonable and just implication to be the rule applicable to all such subjects. And which of several sons is to be deemed the first-born is declared by sect. 125 above cited, "there can be no seniority in right of the mother, but the seniority ordained by law is according to birth."

It appears to their Lordships that the rules just cited approach very nearly to a distinct declaration of the general Hindu law

upon the question, when regarded apart from any special custom prevailing in a particular district or family.

Great reliance was placed, during the argument, on the admission supposed to have been made, that the son of the first wife would succeed before an elder brother by a subsequent wife, and it was contended that, by analogy, the son of the second wife must be entitled to the like precedence over the son of the third. There are, undoubtedly, authorities which shew that the first wife occupies a position of honour and precedence above all others, but it is not necessary for their Lordships to decide whether the admission made in this case is in accordance with general Hindu law; for supposing the law to be so, no just analogy can be established between the status of the first wife and that of any subsequent wife. Her title to special rank and privileges rests upon grounds peculiar to the first wife, and which can have no application to others. (See 1 *Strange's* Hindu Law, pp. 55, 56). The reasons upon which she alone of all the wives, is entitled to peculiar honour and privileges, rather point to the conclusion that the wives subsequently married, if of the same caste and class, are on an equal footing.

It is right to observe that, if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favour of the right of the first-born son. The inheritances of Hindus which descend on a single heir, are almost entirely confined to zemindaries, in the nature of a raj, and to offices (see *Norton's* Leading Cases, pt. 1, p. 278), and it is obviously in accordance with reason and convenience that such successions should devolve upon the son who would, in natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind. But their Lordships do not find it necessary to place their decision on these grounds; they are of opinion, that upon the principles of law deducible from the authorities, the judgment of the High Court is correct, end ought to be upheld.

It appears that the decision under appeal has been followed by the High Court of *Bombay* (*Bhujangrav bin Dhavalatrav Ghorpade* v. *Malojirao bin Dhalavatrav Ghorpade* (1)).

(1) 5 Bomb. H. C. R. 161.

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Their Lordships are glad that they are able to come to a conclusion which will not disturb the rule of succession declared by the concurrent judgments of the High Court in two Presidencies; and they will, in this case, humbly advise Her Majesty to affirm the judgment of the High Court of *Madras* and to dismiss this appeal with costs.

Agents for the Appellant: *Gregory & Co.*
Agents for the Respondent: *Williamson, Hill, & Co.*

J. C.* 1871 Nov. 6. — 1872 May 11.

G. C. W. FORESTER AND OTHERS . . . PLAINTIFFS;

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . DEFENDANT.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAUB.

Act of State—Jurisdiction—Resumption—Jaidad Tenures.

Begum *S.* being a jaghiredar holding lands upon a jaidad tenure and exercising within her jaghire a sort of sovereignty delegated from *Scindia*, agreed to hold the same "as long as she may live" as a jaidadar under the Company, to which *Scindia's* sovereignty was ceded on the 30th of December, 1803. During her lifetime the operation of British law and the jurisdiction of British Courts were excluded from her territories; after her death Regulation law was introduced therein by order of the Governor-General authorized by Act XVII. of 1836. On her death, but before the introduction of the Regulation Law, the Government, acting in the political department, resumed the lands so held as aforesaid, and seized the arms and stores appertaining to the tenure.

In a suit by the representatives of *D. S.* claiming under the Begum's deed or will to recover possession of the said lands, and to hold them free from assessment to Government revenue:—

Held, that the resumption was not an act of state. It was not the seizure by arbitrary power of territories which up to that time had belonged to another Sovereign State; it was the resumption, under colour of a legal title, of lands previously held from the Government by a subject under a particular tenure, upon the alleged determination of that tenure. The

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* *Present:*—THE LORD CHANCELLOR (Lord *Hatherley*), LORD WESTBURY, SIR JAMES W. COLVILE, SIR JOHN STUART, SIR MONTAGUE E. SMITH. Assessor: SIR LAWRENCE PEEL.

validity of that title to resume is *primâ facie* cognizable by the Municipal Courts of *India*.

Secretary of State for India v. *Kamachee Boye Saheba* (1) distinguished.

Held, further, upon the evidence, that the Plaintiffs had not established their title to the lands, as alleged.

But it appearing that the arms and stores were purchased by the Begum, and that there was nothing to disprove her title to the things so purchased, *held*, that the Plaintiffs were entitled to recover the value thereof, with interest.

IN the year 1836, upon the death of Begum *Sumroo*, the Government of *India* resumed her pergunnah of *Badshapore Jharsa*, lying on the west bank of the *Jumna River*, the revenue whereof was Rs.79,793 2*a*. 6*p*. It was claimed by the Begum's heirs as an "Altumgah Jageer," *i.e.*, a grant under the royal seal. At the same time the Government made seizure of the arms, ammunition, and munitions of war in use with her army, or retained for their use at the time of the Begum's death. To try the right of the Government to effect this annexation and seizure two actions were brought on behalf of Mr. *Dyce Sombre*, claiming as heir of the Begum *Sumroo*, and represented by the above Appellants. These actions were known respectively as the "*Badshapore* suit" and the "Arms Suit."

These suits were decided in favour of the Government by the officiating Deputy Commissioner of *Delhi* (July 4, 1865), which decision was affirmed on appeal, first, by the Commissioner of the *Hissar* Division (May 23, 1866), and, subsequently, by the Chief Court of the *Punjaub* (March 19, 1867).

The facts of the cases appear in the judgments of their Lordships.

Sir *R. Palmer*, Q.C., *Leith*, and *Doyne*, for the Appellants.

Forsyth, Q.C., *Archibald*, and *Merivale*, for the Respondent.

For the Appellants it was contended that the conduct of the Government of *India* in not pressing their plea to the jurisdiction in the earlier stages of the suit amounted to a waiver of such plea. Otherwise, that the taking possession by the Government of the estate in question had been shewn to be not "an act of state," or

(1) 7 Moore's Ind. Ap. Ca. 476.

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"an act of arbitrary power," nor done against a "State," but an ordinary case of an asserted legal right of resumption from and against a subject by a ruling power, and on the assumption that the estate had legally lapsed to the Government. Such a case was made under the regulations in force at the time cognisable by the Municipal Court. It was submitted that there was a broad and clear distinction between this case and those referred to in the judgment of the Court below, viz., *The East India Company* v. *Syed Ally* (1), where the Government assumed property and lands which, under a treaty with the Nawab of the *Carnatic*, were recognised as belonging to a wholly independent sovereign; and *Secretary of State for India in Council* v. *Kamachee Boye* (2), where it did so as an exercise of sovereign power by the aid of military force. In this case the Begum *Sumroo*, before the cession by *Scindia* of the territory in which *Badshapore* lay, was not an independent sovereign, or anything more than a mere jaghiredar. As a mere subject of *Scindia*, or of the ex-king of *Delhi*, she was, with her then status, transferred to the *East India Company*, as the substituted sovereign power, and so continued to be under the latter till her death. And at her death, according to the Respondent, her sovereignty and interest of all kinds determined and lapsed to the *East India Company*, and accordingly *Badshapore* at the time of the "assumption" was part of the dominion of the Company, and the "assumption" in question was therefore an exercise of authority by the ruling power against an ordinary individual, and as such cognizable by the Municipal Court.

The effect of the Regulations XXVI. of 1803, XIV. of 1825, and Act XVII. of 1836, was also discussed.

With regard to the arms and military stores, it was contended that they were purchased by the Begum out of her own moneys, and passed as her private property by deed of gift or will to the original Plaintiff.

For the Respondent it was contended upon the evidence that the Begum was the ruler of an independent state, and had been so recognised and treated by the Company; and that the seizure of *Badshapore* was an act of state, not cognizable by the Muni-

(1) 7 Moore's Ind. Ap. Ca. 555. (2) 7 Moore's Ind. Ap. Ca. 476.

cipal Court. Reference was made to *The Rajah of Tanjore's Case* (1); *Advocate-General* v. *Ameerchand* (2).

With regard to the arms and military stores, it was contended that they were State property, and as such could not be alienated by the Begum, either by deed of gift or will.

Sir *R. Palmer*, Q.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (Lord *Hatherley*):—

BADSHAPORE SUIT.

In this suit the representatives of the late Mr. *Dyce Sombre* claim to recover from the Government of *India* possession of a valuable estate called pergunnah *Badshapore Jharsa*, with mesne profits since August, 1836. They do not claim merely a zemindary interest in the lands. They claim to hold them rent free: that is, free from assessment to Government revenue. And the total value of the claim is assessed in round numbers at a sum little short of a quarter of a million sterling.

The defence to this suit, on the part of the Government of *India*, is two-fold. It is alleged, first, that, on the death of the Begum *Sumroo*, in 1836, the estate, whatever were the nature and extent of her interest therein, was resumed by an act of Government which, having regard to the status of the Begum as an independent, or quasi-independent Sovereign, was an act of state, the propriety and validity whereof are not cognisable by any Municipal Court. And in support of this proposition they rely on the case of the Rajah of *Tanjore*, reported in 7th Moore, 476, and similar authorities. It is further alleged that, if the case is cognizable by the Municipal Courts, the Appellants have failed to establish by trustworthy evidence the title to this estate on a rent-free tenure (capable of passing to Mr. *Dyce Sombre* by the deed of gift, or subsequent will of the Begum *Sumroo*).

In order to test the sufficiency of the first defence it is necessary to come to a clear conclusion touching the status of the Begum *Sumroo* both before and after the acquisition by the *East India*

(1) 7 Moore's Ind. Ap. Ca. 476. (2) 1 Knapp, P. C. 329, n.

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Company of the *Doab* and the territories on the west of the *Jumna*, comprised in the Treaty of Peace concluded with *Dowlut Rao Scindia* on the 30th of December, 1803.

It will be convenient to consider the question with reference to the Begum's possessions at *Sirdhana* and elsewhere within the *Doab;* because the negotiations and correspondence with her were, up to the time of the final agreement or treaty with her in 1805, confined to those possessions; no mention being made therein of *Badshapore*, which is on the western side of the *Jumna:* and because the acts and powers of the Government in the resumption of *Badshapore* cannot be put upon higher ground than their acts and powers in the resumption of *Sirdhana.*

The status of the Begum, in respect of her *Doab* possessions before 1803, is admitted to have been that of a jaghiredar, holding upon a jaidad tenure, *i.e.*, upon a grant of a certain district together with the public revenues of it, on the condition of keeping up a body of troops, to be employed when called upon in the service of the Sovereign of whom the jaghire was held. The *de facto* Sovereign of the *Doab* at this time was *Dowlut Rao Scindia.* There is nothing in the record to shew what powers over the inhabitants of the district included in such a jaghire were, as incident to the tenure, vested in the jaghiredar. But it cannot be doubted that, practically, the whole administration of the territory included in her jaghire, whether civil or criminal, was vested in the Begum, who exercised a sort of delegated sovereignty therein.

This being the condition of the Begum in the early part of 1803, Lord *Wellesley*, in pursuance of the policy by which he succeeded in detaching certain French adventurers from the service of *Scindia*, appears to have entered into negotiations with her before the actual commencement of hostilities with the Mahratta Prince. War, though previously certain, was not declared until August, 1803, and Lord *Lake's* force broke up from *Cawnpore* on the 7th of that month. But the earliest letter from Lord *Wellesley* to the Begum that is set forth in the Record is dated the 20th of May; that letter shews that a previous correspondence had taken place between them, having for its object the diversion of the Begum and her battalions from the service of *Scindia* to that of

the English. The negotiation so begun was continued throughout the war. Though this negotiation may not have prevented such of the Begum's troops as were actually with *Scindia* under her Lieutenant-Colonel *Saleur*, from fighting against us at the Battle of *Assaye*, yet it kept her friendly to us in her own district. Nor can it be doubted that, at the time when peace was concluded, and by the Treaty of the 30th of December, 1803, the sovereignty over the *Doab* and the territories west of the *Jumna*, in which *Badshapore* is situate, passed from *Scindia* to the *East India Company;* the Governor-General had fully determined that the future relations of the Begum and the Company, though not as yet precisely defined, were to be friendly, and that our rights of conquest were not to be exercised to her prejudice. This appears, from Lord *Wellesley's* letter to Lord *Lake*, of the 23rd of December, 1803, which admits that the Government could not in fairness establish British authority, or introduce British law into the territory composing the Begum's *Doab* jaghire; and the nature of the equivalent proposed, in the event of her agreeing to exchange those possessions, is also a circumstance which has some bearing upon the present question. It appears for some time to have been in Lord *Wellesley's* contemplation to make the *Jumna* the western boundary of the purely British territory, and to form the territories conquered from *Scindia* on the western bank of that river into independent and protected principalities. And it being then considered desirable to remove the Begum out of the *Doab*, it was proposed to give her one of these principalities, reconciling her to the inconveniences of the exchange by the accession of dignity implied in treating her as *a Sovereign* under the protection of the British Government. This seems to be the fair construction of Lord *Lake's* letter of the 23rd of November, 1803, to the Governor-General, and of all that was done upon it. This negotiation was continued after the ratification of the Treaty of the 30th of December, 1803, and when the sovereignty of the *East India Company* in the territories ceded by that Treaty had become complete. This project, however, was ultimately abandoned by Lord *Cornwallis;* and the final Treaty or agreement with the Begum was made in August, 1805. The substance of that agreement is that, "Those places in the *Doab* which have formed the

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jaidads of *Zeboolnissa Begum* shall remain to her (as before) from the Company as long as she may live." What follows may either be the expression of conditions *quæ tacité insunt* in a jaidad tenure, or conditions superadded thereto.

But the fair construction of the instrument and of the correspondence which led up to it seems to be that the Begum was for her life to hold her territories in the *Doab* from the Company as she had held them under *Scindia;* and that, as she was not a Sovereign Princess, but a mere jaidadar under *Scindia*, she was to remain such under the Company, the project of conferring upon her the new dignity of a Sovereign Princess having been only part of the larger project for an exchange of territory, and abandoned with it.

Up to this time there is little, if any, express mention of *Badshapore*. It is, however, admitted on both sides that the Begum was *de facto* in possession of it when the cession of 1803 took place, and that she continued during her life to hold it, and to exercise therein the same powers of government and administration which she exercised at *Sirdhana*.

This view of the status of the Begum is confirmed by the 9th paragraph of Lord *Metcalfe's* letter of the 4th of May, 1836. The authority upon such a subject of a man of his experience and character is of the highest value.

That being so, the present case is distinguishable from that of *Kamachee Boye Saheba* in the 7 Moore's Ind. App. Ca.

There the Rajah of *Tanjore*, though he may have had less substantial power than that exercised by the Begum *Sumroo*, retained at least the shadow of original and independent sovereignty. Lord *Kingsdown* thus put the question: "What was the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of *Great Britain* of the dominions and property of a neighbouring state, an act not affecting to justify itself on grounds of municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of *Tanjore* in trust for those who, by law, might be entitled to it on the death of the last possessor. If it were the latter, the defence set up has no foundation."

The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign state; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under colour of a legal title; that title being the undoubted right of the sovereign power to resume, and retain or assess to the public revenue all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent-free. If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would *primâ facie* be cognizable by the municipal Courts of *India*.

The particular case was, no doubt, somewhat complicated by the peculiar nature of the powers exercised by the Begum in her jaghires; and the practical exclusion of her territories during her lifetime from the operation of British law and the jurisdiction of British Courts.

Their Lordships think that the Regulations, which were the written law of that part of British *India*, and whatever else may be held to constitute British law, were not introduced into these territories by Regulation VIII. of 1805, or until after the passing of Act XVII. of 1836. The Begum's territories were treated as excepted from the conquered territories; and although the sovereign rights of *Scindia* over these territories passed under the Treaty of 1803, they passed subject to the rights of the Begum, the precise definition whereof was then the subject of the negotiations which resulted in the agreement of 1805. Accordingly, on the Begum's death, it was thought necessary to pass an Act of the Legislature in order to legalize the introduction of regulation law into these territories by order of the Governor-General. That this was done by legislation, and not by proclamation, affords perhaps, another argument against treating the annexation of these territories as an act of conquest or arbitrary power, or as the exercise of an original right of conquest which had remained in suspense during the Begum's lifetime. It is probable, however,

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that the abnormal condition of these territories was one reason why the resumption took place, not as it would have taken place in a province or district wherein the action of Government is fettered by the Regulations, by a resumption suit, but in what is called the political department; and thus both parties seem, for some time at least, to have considered that the act was in the nature of an act of state. For it is to be observed that Mr. *Dyce Sombre* himself asserted his supposed rights by memorials and appeals to one political authority after another, beginning with the Lieutenant-Governor of the *North-West Provinces*, and ending with the Prime Minister; and that it was not until after his lunacy and the order of Lord Chancellor *Lyndhurst* in that matter, that any recourse to the municipal Courts was had, or apparently even contemplated.

These considerations, however, though they may explain much of what appears from the record to have taken place, cannot affect the determination of the question under consideration. They cannot alter the legal nature of the acts of Government, or make the resumption, under the assertion of a legal title, of lands claimed adversely by a subject, an arbitrary act of sovereign power against an independent state. And even if the state of the law in the territories in question at the time when the act of resumption took place gave—as perhaps it did—a larger power of resumption to the *East India Company* than it possessed in the regulation provinces, that circumstance would not exclude the jurisdiction of the Courts. For these reasons their Lordships are of opinion that the first ground of defence, being that on which the Courts below have mainly proceeded, fails.

This being so, it is next to be considered whether the Appellants have established their title to *Badshapore Jharsa* as held in perpetuity by a rent-free tenure; in other words, whether they have proved a grant by the sovereign power of the rent of the lands, which rent would otherwise be payable to the State.

The original suit having been brought in 1848, to recover the estate from the *East India Company*, which had been in possession since 1836, the burden of proving a title sufficient to disturb that possession necessarily lies upon the Appellants. This, however,

would not have been otherwise had the commencement of the litigation been in 1836, and by proceedings in an ordinary resumption suit. For the regulations touching such suits cast upon the person who claims to hold land lakhiraj, or free from assessment to Government revenue, the burden of establishing a title recognised by law as sufficient to give that exceptional immunity, and require very stringent proof in such cases.

Regulation II., of 1819, which the Appellants, in their original pleading, invoke as one of those by which the claims of Mr. *Dyce Sombre* ought to have been determined in 1836, by its 28th section provides, that an ancient sunnud shall not be treated as sufficient proof of its contents on the faith of its seal, or without confirmatory evidence. And section 3 of Regulation XIV. of 1825, also shows the high degree of proof required. Nor are such provisions unreasonable, since every grant of this kind implies a perpetual alienation in favour of some individual, and his heirs, of a portion of the land revenue (the impost, if impost it is to be called, which immemorial custom has made the most natural and tolerable to the natives of *India*), and thus operates not only in derogation of the rights of future Governments, but to the injury of the subject, on whom the incidence of taxation for the necessary purposes of Government will be the heavier, in proportion as the public revenue is wasted by such alienations.

It is of the utmost importance in a case like the present to observe in what manner and upon what proofs the case of any claimant is first advanced.

In the plaint filed in August, 1848, by the committee of Mr. *Dyce Sombre*, it was stated generally and without condescending on the name of the grantee, that the altumgha jaghire *Badshapore Jharsa* was originally granted by the Emperor *Shah Allum*, and subsequently confirmed by *Madho Rao Scindia*. But in the substituted plaint, which was filed in January, 1864, by the Appellants, and must be taken to be the foundation of the existing suit, the statement is more specific. It is this—"The pergunnah of *Jharsa*, inclusive of *Badshapore*, was granted as an altumgha jaghire to the Begum *Sombre* (or *Sumroo*) by his late Majesty *Shah Allum*, in the 30th year of the ascension, and this grant according to the sunnud, dated the 2nd Zuffer, the 37th year of

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the ascension, was confirmed by the Maharajah *Madho Rao Scindia*." and the 4th, 5th, and 6th of the issues settled in the cause upon which the parties went to trial were:

Whether the pergunnah of *Badshapore Jharsá* was granted by *Shah Allum* to the Begum *Sumroo*, as mentioned in the plaint?

Whether, if it were so granted, *Shah Allum*, at the time of such grant, possessed and exercised supreme power within the territory in which the lands were situated? and

Whether, if the same were granted, the grant was confirmed by *Madho Rao Scindia*, as in the plaint mentioned?

It will be convenient here to state the history and character of the alleged grant from *Shah Allum* as disclosed by the documents upon which the Appellants mainly rely, viz., the papers procured from *Delhi*.

The case which the counsel for the Appellant made on these documents is, first, that in the month of Shuwal in the 30th year of *Shah Allum*, the Begum presented a petition, praying that a new and complete altumgha sunnud of pergunnah *Jharsa* might be granted to her in substitution for one previously granted to *Zuffur Yaub Khan*, the son of *Sombre* or *Sumroo*; secondly, that a report was made, recapitulating the prior devolution of the estate, shewing that it had been held by certain great officers of the Court of *Delhi* in succession, as part of their respective jaghires, that it had for some time "continued released" as jaidad of the battalion of *Sumroo Bahadoor Feringee*; and on the 15th of Rujub of that year (with the exception of certain villages) had been granted in altumgha to *Zuffur Yaub Khan* on a representation that an altumgha sunnud under the seal of Maharajah *Pultail* (said in one part of the record to be a title of *Scindia*) had been lost; thirdly, that on this report and on the 19th of Shuwal the king issued a firman to the effect that an altumgha grant of *Badshapore Jharsa*, with the exception of the villages excepted from the grant to *Zuffur Yaub Khan*, should be made to the Begum in the terms therein expressed; fourthly, that whether the formal grant or sunnud was or was not issued to her in pursuance of that firman, she two months afterwards presented another petition, in which she made no reference to the preceding grant to *Zuffur Yaub Khan*, but stated that all the estate, including the

excepted villages, had since the death of *Sumroo* been in her possession as jaidad; and that in consequence of that petition a sunnud of the whole estate, including the villages before excepted, was granted to her in altumgha under the Khas' seal and golden togra of the Emperor on the 9th of Zilhij, in the thirtieth year of his reign.

If these facts are true, it follows that until the month of Shawul, or that of Zilhij, in the thirtieth year of *Shah Allum*, whatever interest the Begum had in *Badshapore* was in the nature of a jaidad tenure; that *Zuffur Yaub Khan* never had an altumgha grant of that estate under a sunnud of the Emperor, except for a period of, at most, three months, and that, so far as appears, he was never in possession under that grant.

The original documents, of which the foregoing is the effect, were not produced, and the copies or alleged copies produced in evidence are admitted to have had no existence before 1847. They are said to have been then copied from old records at *Delhi* at the instance of the committee of Mr. *Dyce Sombre*, or his legal advisers, with a view to the proceedings commenced in the following year.

If the transactions which they represent to have taken place really took place, an original sunnud in the terms of what in the record is called "sunnud No. 3," must have been issued to the Begum *Sumroo* under the seal of *Shah Allum*. But of this original sunnud there is no trace. It is not produced; its loss is not accounted for. There is no evidence that anybody ever saw it.

It has been strongly argued for the Government, that the non-production of the original not being accounted for, secondary evidence of its contents is not admissible. Their Lordships are by no means prepared to say that an Indian Judge would not do right, according to the practice of the Courts of that country, in rejecting a copy if the absence of the original were not satisfactorily accounted for. There seems to be no reason for assuming that a rule requiring the best evidence producible to be produced, has no application to Courts of which the Judges may be presumed to be, for want of professional training, less capable than they are elsewhere of weighing the effect of evidence. This Committee undoubtedly enforced the rule in the case of *Syud Abbas*

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Ali Khan v. *Yadeem Ramy Reddy* (1). There have, however, been other cases in which their Lordships have declined to apply to Indian cases the strict rules of evidence which obtain in this country on trials at *nisi prius*. And, considering that in this case the Judge of first instance has commented on the copies in question, their Lordships propose to treat them as admitted in point of fact, and to consider what credit and effect ought to be given to them. Nevertheless, in weighing the whole evidence given in support of the Appellants' title, the absence of proof that the original sunnud once existed, and was subsequently lost or destroyed, is a very grave circumstance, which cannot be excluded from consideration.

The case as to the copies of the sunnud put forward by the learned counsel for the Appellants is, that they are proved to be copies taken from ancient documents at *Delhi*, since destroyed in the mutiny, which, whilst they existed, were public records, and of the same value as a duplicate original of the missing sunnud.

But what is the evidence as to these papers? The proof of the most important of them, that called sunnud No. 3, depends on the testimony of the witness, *Balmokund*, given in 1865. He has deposed that in 1847 he was ordered by the then Peshkar of the King of *Delhi* to make the copy in question from an old paper which the latter took out of a cloth. The words of the witness are, "It was out of a dozen or so of the papers of the former times which had 'escaped,' and had been tied up by him in his 'busta,' or record cloth." He goes on to say, "There had been countless papers in the charge of his (the Peshkar's) forefathers: many of them had doubtless been destroyed by insects, or perished in other ways. By 'escaped,' I mean those old papers or records which had come down from his forefathers into his actual possession." In answer to the inquiry, what had become of the paper from which he made the copy, he said, "The Peshkar died in 1850, and all trace of his documents has disappeared;" and added, that the different servants of the king had each in their possession a few pounds' weight of documents, that had been handed down from father to son, besides those relating to their own time. He had previously said, when asked whether he lived in the Peshkar's

(1) 3 Moore's Ind. Ap. Ca. 156.

house, "No; I went there for business; after the taking of *Delhi* by the British" (which words, as the Peshkar died in 1850, must be taken to refer to the original introduction of British authority in *Delhi*, rather than to the taking of the city in 1857), "the 'duftur' (registry office) of the king hardly existed."

Hence it appears that the paper from which the copy is said to have been made was anything but a record regularly kept and preserved, which afterwards perished in the storming of *Delhi*, if full credit be given to the witness and to his means of knowledge. It came to the Peshkar with a few pounds' weight of other documents, was accidentally preserved when many others perished, and disappeared with him. Their Lordships cannot treat such a paper as having the validity of an authentic record, the value of which depends on its custody in an authorized registry by a responsible officer. The evidence of *Chujo Singh*, as to the other and less important paper (No. 4) is of the same character.

An attempt was made to cast further suspicion on these copies and the transactions which they are produced to prove by the dates. It is contended on the part of the Respondents that the months of Shawul and Zilhij of the thirtieth year of *Shah Allum*, fall within the autumn of 1788, when he was a helpless prisoner in the hands of *Gholam Khadir*, the Rohilla, who put out his eyes. On the other hand, the Appellants assert that the date in question corresponds with the autumn of 1789. There is much that may be urged to support the Respondent's contention. It seems to be certain that *Shah Allum's* reign, notwithstanding a short interregnum, was calculated from the death of his father *Alamgir* II., which Mr. *Elphinstone* and the best historians fix in November, 1759, corresponding with Rabi II., A.H. 1173. It follows that the "Jalus" or accession of *Shah Allum* is correctly fixed by Mr. *Prinsep* in his Tables as 1 Jumadi I., A.H. 1173; and if the thirtieth year of that prince's reign is to be calculated in the ordinary way from that date, it would begin on the 1 Jumadi I., A.H., 1202, and end with the 1 Jumadi I., A.H., 1203. The months of Shuwal and Zilhij of the thirtieth year would then fall within 1203, and correspond with the autumn months of 1788. On the other hand, the Appellants have referred to some coins and seals, from which it would appear that the 30th year of *Shah Allum's*

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reign was treated as identical with A.H. 1203; and from this and a passage in Mr. *Seton's* letter, afterwards referred to, they have argued that the dates in question must be taken to correspond with the autumn months of 1789. This view may perhaps be capable of being reconciled with the date of *Shah Allum's* accession by some peculiar mode of calculating the Jalus year; and their Lordships would be sorry to make their decision turn in any way upon a disputed point of Indian chronology. They may observe, however, that even if the dates in question are taken to fall within the year 1789, there is reason to doubt whether *Shah Allum* was at that time in a condition effectually to alienate any part of the revenues of the territories within which *Badshapore* is situated; at least, without the concurrence of *Scindia;* and that there is no suggestion that the alleged grant received the sanction of the Mahratta Power until 1795.

Their Lordships, considering the nature of the documents under consideration, and the testimony by which they are supported, have come to the conclusion that the Appellants have not given evidence which can be accepted as sufficient proof of a grant, of which the original is neither forthcoming nor accounted for, unless the presumption of its existence can be assisted by the other evidence in the cause.

The corroboration chiefly insisted upon was of this kind: it was argued that copies of certain sunnuds, shewing his title to *Badshapore*, were proved to have been sent by Mr. *Dyce Sombre* in 1836 to the officers of Government; that these were not shewn to have been returned by the Government, and have not been produced by them in this suit: that they must therefore be assumed to have been identical, or, at all events, not inconsistent with the documents subsequently procured from *Delhi*. It was further insisted that, inasmuch as Government did not question the genuineness of these sunnuds in 1836, they must be taken to have been then satisfied of their authenticity. This argument is confined to the copies of sunnuds supposed to have been sent by Mr. *Dyce Sombre* after the Begum's death. It is hardly pretended that the Government ever received from her any document of title except a copy of *Scindia's* perwannah. The sunnuds sent to Mr. *Fraser*, whatever they may have been, were returned by her messenger. Mr.

Forsyth, on the other hand, argued strongly that Government was not shewn to have received from Mr. *Dyce Sombre* copies of any documents corresponding with those now relied upon; or, indeed, the copy of any document of title except *Scindia's* perwannah. The evidence on the point is as follows:—

Mr. *Dyce Sombre*, writing in the beginning of March, 1836, to Mr. *Hamilton*, says: "I beg to say I have already forwarded to you the copies of the sunnuds, by which her late Highness held her jaidad, and the pergannah of *Badshapore* in altumgha, assigned to her by the former rulers of *Hindostan*, being antecedent to the British sway of this adjoining district." These words would be grammatically accurate, if nothing relating to *Badshapore* but a copy of *Scindia's* perwannah, previously called by the Begum, in her letter of 1832, a sunnud, had been sent. And Mr. *Hamilton*, writing to Mr. *Hutchinson*, says—"I also annex a copy of the sunnud referring to *Badshapore*," having in the preceding sentence spoken of the sunnuds relating to *Sirdhana*. The argument that he would not have applied the word sunnud to the perwannah does not appear conclusive. Their Lordships can give no credit to the alleged copy of the letter set out at p. 29 of the record. It was hardly pressed by Sir *Roundell Palmer* in reply. But Mr. *Hamilton's* letters of the 20th of May, 1836, and of December, 1836, have been strongly relied upon by the Appellants. They were written by him as Collector of *Meerut*, with the object of having applied to the back rents of *Sirdhana*, which was within his jurisdiction, a more stringent rule than that which his superiors were disposed to apply either to *Sirdhana*, or to *Badshapore* (with which he had no official connection). He draws a distinction between the two tenures; treating *Sirdhana* as jaidad, and *Badshapore*, whether resumable or not, as the Begum's personal jaghire. That this was the nature of the Begum's claim would perhaps appear from the copy of *Scindia's* perwannah; but it must be admitted that these letters are, on the whole, more consistent with the Appellants' than with the Respondent's theory concerning the number and nature of the documents sent by Mr. *Dyce Sombre*.

One great and unexplained difficulty, however, touching the copies of sunnuds supposed to have been sent by Mr. *Dyce Sombre*

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is this:—From what were these copies made? If from originals, where are the originals? If from other copies (and it was admitted at the Bar that he must be presumed to have retained copies of whatever he sent), what became of those copies? Mr. *Dyce Sombre* was in correspondence with the home authorities touching his claim, up to 1842. He was presumably then in possession of all the documentary proof he ever had of his title. He was found a lunatic on the 30th of July, 1843, and Mr. *Larkins* was appointed his committee in 1844. There was a faint suggestion at the Bar that his documents of title were lost or destroyed during his lunacy. But there is not the slightest proof of this; and the non-production of any such documents in the suit affords grounds for supposing that neither Mr. *Dyce Sombre*, between 1836 and 1842, nor Mr. *Larkins*, when he took the advice of counsel in 1847, had any copies of the alleged sunnuds from *Shah Allum;* and, if so, it seems difficult to fix the Government with clear notice in 1836 of the previous title now sought to be established by the copies procured from *Delhi* in 1847.

Their Lordships are of opinion that even if the Government were fixed with the notice of the claim of such title, it is not to be inferred that, because they did not then dispute, they admitted, its genuineness. It is clear from all the proceedings that they did not profess to investigate the title. Their position throughout was, that the tenure was, either in its nature or by arrangement, resumable on the Begum's death, and they resumed it when that event happened.

The Appellants' case, however, presents still graver difficulties. When a doubtful title is in dispute the first question that suggests itself is—when was it first asserted? and has it been continuously and consistently asserted? In the present case it is clear that this particular title was never asserted by the Begum in her lifetime, but that, on the contrary, she repeatedly asserted a different one, and acted in a manner wholly inconsistent with the presumption of its having existed. The following is the short summary of the correspondence of the Begum in her lifetime with the Government touching *Badshapore*.

The first mention of any special title to the pergunnah is to be found in the printed correspondence in Mr. *Seton's* letter of the

24th of February, 1808, when he complains of the attempt of the Begum on the 25th of November, 1807, to obtain from the King of *Delhi* a new firman, granting this pergunnah as an enam altumgha to Mr. *George Dyce* (the father of Mr. *Dyce Sombre*) and his descendants. Mr. *Seton's* statement as to the property is, that it was bestowed as a jaghire (which may be a mere estate for life) by *Shah Allum* in the thirtieth year of his reign, which he treats as corresponding to 1789 A.D., upon *Zuffur Yaub Khan;* that the Begum had obtained possession of it in that person's lifetime, and retained such possession after his death; and had now obtained a new firman bestowing pergunnah *Jharsa* and the town of *Badshapore,* formerly the jaghire of *Zuffur Yaub Khan,* as an altumgha upon Mr. *George Dyce* and his descendants.

The Government of the day objected to this proceeding; insisted that *Badshapore,* like the Begum's possessions in the *Doab,* would revert to the *East India Company* on her death, and was obviously determined not to recognise as valid any grants of that nature which might be made at that date by the King of *Delhi;* but recommended that, in deference to the King and to her, she should be induced by friendly negotiations to give up the new sunnud. The negotiations for this purpose went on till 1811, when the Begum did give up the new sunnud. But the important fact in this transaction is, that the case she then put forward (see her letter of the 16th of February, 1811), was the following:—"I had, as I still retain, a firm conviction in my own mind that the pergunnah of *Badshapore,* and the villages of *Bhijapoora* and *Bhudpore,* were held as altumgha to my late son, and would consequently revert to my adopted son, *George Alexander David Dyce,* in virtue of his marriage with my granddaughter. On this subject doubts have arisen respecting the nature of the grant, which is not now to be found in the family records. I consequently cannot urge a positive right, but" &c.

This letter contains most important admissions, which are utterly fatal to the title set up in the amended plaint. It shews that at that time no grant could be found; furthermore, it asserts "the firm conviction" in the Begum's mind that *Badshapore* was held as altumgha to her late son, but that, in consequence of doubts respecting the nature of the grant which could not be

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found in the family records, she could not urge "a positive right." Now it is inconceivable that if she had obtained a grant to herself from *Shah Allum*, she should not, at this date (1811), have remembered it, and remembering it, should not have put it forward; and if such a grant ever had existence, and could not then be found among her family records, what reason can be suggested why she should not then have applied to the registry of the King at *Delhi* for a copy of it?

In 1825, after an interval of fourteen years, she proposed to surrender the jaghires held by her, including *Badshapore*, a proposal which was never carried into effect. She seems to have then made no statement of her title, but the representation of Colonel *Dyce*, with whom she was then on bad terms, was, that the sunnud on which the jaghire was held, whatever its effect, was in favour of *Zuffur Yaub Khan*. Had the Begum at that time been in possession of sunnuds in her own favour, superseding the grant to *Zuffur Yaub Khan*, she would hardly have failed to produce them.

In 1831 she first expressed a desire that her jaghires should be assigned to Mr. *Dyce Sombre*, whom she designates as her adopted son and intended heir. In her letter to Government she speaks of *Badshapore* and its dependent villages as property "which the deceased Nawab, his grandfather, was possessed of on altumgha tenure."

The Government, then, as before, appears to have refused its assent to the alienation after her death of any of the lands held by her rent-free; treating the whole as revertible to Government after her death. Some time in 1832, as it is supposed, she made a further application to Government by the letter of which the substance is set forth in the Record. This letter is the only one which can be taken to contain the assertion of an altumgha title to *Badshapore* in herself. She speaks of the estate as "my altumgha"; and forwards with some other documents a copy of *Scindia's* perwannah. But even in this letter, when combatting the supposed objection of Government that *Badshapore* was included in the arrangement made with her, through Mr. *Guthrie*, she says: "I beg to observe that the country of the *Doab* only is mentioned in it (Mr. *Guthrie's* letter); while the pergunnah of

Badshapore alias *Jharsa*, my altumgha, and the gardens, &c., were bestowed on Nawab *Zuffur Yaub Khan*, the maternal grandfather of Mr. *Dyce*, for his expenses." This sentence would imply that the title was that of *Zuffur Yaub Khan*, though the *de facto* possession was hers.

In March, 1833, she again renewed the attempt to get the Government to consent to the transmission of this estate to Mr. *Dyce Sombre*. The Government again refused to give its consent, treating the estate as held on a life tenure only. But on this occasion the Begum once more clearly rested her claim upon an alleged altumgha grant to Nawab *Zuffur Yaub Khan;* and referred to sunnuds importing such a grant as being in her possession. There was not on this occasion the slightest suggestion of a grant in her own favour.

The discussions, therefore, between the Government and the Begum touching *Badshapore* and the tenure on which it was held, cover a period from 1808 to 1833. The Government throughout that period insisted that her interest was limited to her life, and that on her death the estate would revert to the State. The Begum, on three or four several occasions, at considerable intervals of time, contended that the tenure was altumgha; sometimes appealed to the Government to continue it after her death as a matter of favour, sometimes attempted to raise a claim as of right; but on every occasion, except, perhaps, in her ambiguous letter in 1832, rested on the alleged grant to the son of *Sumroo*, and never pretended that that grant had been superseded by the sunnuds in her own favour, on which the Appellants now rely. Her letters, moreover, point to a substantial grant of the estate to *Zuffur Yaub Khan* in altumgha, and to the possession of it by him under that tenure. They are quite inconsistent with the case made by the *Delhi* document, *viz.*, that the altumgha grant to him endured only three months; and was never perfected by possession. The correspondence also concerning the pensions and the negotiations she entered into on that subject are wholly inconsistent with the theory that she held or claimed to hold *Badshapore* in altumgha by a valid grant to herself.

Sir *Roundell Palmer* endeavoured to meet the strong presumption which this continued course of conduct, and these repeated

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representations on the part of the Begum raise against the validity of the alleged sunnuds, by an ingenious theory that she may have conceived that claims founded on an alleged grant to Nawab *Zuffur Yaub Khan* would be more likely to find favour with Government than one founded on sunnuds in her own favour; because they might treat the latter as superseded by the agreement of 1805. This suggestion, which after all is pure speculation, does not really afford a probable explanation of her conduct. If an altumgha jaghire had been granted to Nawab *Zuffur Yaub Khan*, the Begum had virtually usurped his rights before the cession of the territories west of the *Jumna* by *Scindia* to the *East India Company*. The British Government would in no way be bound, and certainly would be little disposed, to recognise a title which had been *de facto* defeated before the territories in question were ceded to them. They would be less inclined to recognise it if the title of *Zuffur Yaub Khan* had been of so flimsy a character and short duration, as the case now made represents it to have been; and had been *de jure* superseded by a grant to the Begum in 1789. If the case of the Appellants is true these circumstances might easily have been ascertained by inquiry through the British officers at *Delhi*. Again, the Begum could not make title to the estate through the son of *Sumroo*. In seeking to transmit the estate to *Dyce Sombre*, she sought to transmit it as from herself. It was, therefore, more natural, if she had a title in her by valid sunnuds from *Shah Allum*, that she should put forward and rely on that title, than that she should rest on the old grant to *Sumroo's* son which she herself had practically set aside. Nor is it easy to explain why, in 1807, she should have obtained from the Court of *Delhi* a sunnud, little likely to be recognised by the British Government, and founded on the alleged title of *Zuffur Yaub Khan*, when, if the present case be true, that title had been already superseded by a valid sunnud in her own favour.

If the validity of the documents on which the Appellants now rely were supported by strong and independent evidence, it might be reasonable to endeavour to account for the Begum's silence concerning them by theories, more or less plausible, of the nature of that put forward by Sir *Roundell Palmer*. But if, as has been shewn, the direct evidence in favour of the documents is weak and

suspicious, then the presumptions arising from the acts and conduct of that astute woman should be allowed to have their full and natural weight against them.

The only remaining question is, what effect is to be given to the perwannah alleged to be *Scindia's* confirmation of the sunnuds? Can it be taken to supply the deficiency in proof of the sunnuds, and to establish or corroborate the title of the Begum? It is known to have existed in the Begum's lifetime, since a copy of it was sent by her to Government in 1832. There is no other proof, except the seal, of its origin. And the seal, if not fatal to it, casts the greatest suspicion on this document. It is pleaded as a confirmation by *Madha Rao Scindia.* But the evidence proves that, at its date, *Madha Rao Scindia* was dead. If, as it has been contended on behalf of the Appellants, the confirmation pleaded is to be taken as a confirmation by *Dowlut Rao Scindia,* the difficulty arises that the document bears the seal of his then deceased predecessor. There was no proof that this seal was adopted and used by *Dowlut Rao Scindia,* but it was attempted to get over the difficulty by a reference to the case of *Baboo Gopall Lall Thakoor* v. *Teluck Chunder Rai* (1). In that case there was evidence that the seal of the deceased zemindar had in several instances, other than that in question, been used after his death. Here there is no proof that *Dowlut Rao* ever in any other instance used the seal of his predecessor; it is highly improbable that he should do so, and it would be dangerous, as well as unreasonable, to hold that, because a loose practice has been shewn in one case to have prevailed in the kutchery of a *Bengal* zemindar, it may be inferred in another that the same practice prevailed in the durbar of a powerful sovereign prince. Their Lordships, therefore, cannot treat the alleged confirmation of the Begum's title by the Mahratta Prince, in 1795, as established.

Weighing, then, the direct evidence in favour of the sunnuds, weak and suspicious as it is, against the presumptions arising from the non-production of the original sunnud, and the failure to account for it; and against the still stronger presumptions arising from the acts, representations, and conduct of the Begum in her lifetime, their Lordships have come to the conclusion that the Appellants have failed to establish the title which they have set

(1) 10 Moore's Ind. Ap. Ca. 192.

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up. To decree in favour of a title to an hereditary and transmissible lakhiraj estate, on evidence so untrustworthy, would be contrary to the long-established practice of the Courts in *India;* and such a decision would be a dangerous precedent.

The proceedings in this case undoubtedly disclose many things which, in their Lordships' opinion, are to be regretted. It is particularly to be regretted that the Government did not, in some way or another, investigate the title of Mr. *Dyce Sombre*, in 1836, as a question of right, instead of dealing with it by an act of power. It is to be regretted that, in 1849, they did not fairly try the question of title, instead of meeting it by a plea of the *Statute of Limitations.* But after the fullest consideration of the case, and with every desire to give to the Appellants the benefit of any inference which may be legitimately drawn from the circumstances of this protracted ligitation, their Lordships see no grounds for believing that, if the cause had been tried in 1836, as an ordinary resumption suit, under the Regulations, Mr. *Dyce Sombre* would not equally have failed to shew a good title to an altumgha tenure in the Begum. If it were necessary for their Lordships to express an opinion of the nature of the Begum's interest in *Badshapore*, they would incline to the opinion that her persistent statement of there having been some grant to *Zuffur Yaub Khan* was not without foundation; that she had in some way usurped his interest when she got undisputed command of the troops; and that the British power found her in the enjoyment of the estate, and left her so during her life. Any such opinion, however, must be, more or less, matter of speculation. For the determination of this appeal it is sufficient to say, that the Appellants have, in their Lordships' judgment, wholly failed to prove the fourth and sixth of the issues settled in the cause, and, therefore, to establish the title pleaded by them; and their Lordships have come to the conclusion that the appeal in this suit ought, on this ground, to be dismissed, and the decrees of the Indian Courts affirmed; and their Lordships will advise Her Majesty accordingly.

ARMS SUIT.

In "The Arms Suit," their Lordships are of opinion, for the reasons already given in the *Badshapore* suit, that the seizure of

those arms and stores was not an act of state, but an act done as under a supposed legal right on the resumption of the jaidad upon the Begum's death. They think that the evidence shews that the arms and stores were purchased by the Begum, and that there is no authority or evidence to shew that those who hold by jaidad are not entitled to things so purchased. They are entitled to all the rents on performance of a certain duty, which duty ceases on their death, and the next jaidadar would be bound to provide arms by virtue of his tenure.

Their Lordships think the decree in this suit should declare the Appellants entitled to recover from the Government of *India* the value of the arms and military stores seized, with interest on such value, from the date of seizure, at the ordinary rate of 12 per centum per annum; and that unless the parties agree to name a sum as representing such value, or agree to refer to arbitrators, in this country, the question, what, at the date of the seizure, was the value of the articles seized, the case must be remitted to *India*, with instructions to the Court there to ascertain such value, and give a decree accordingly. Her Majesty's order on this appeal may be suspended until the parties shall come to a conclusion as to the course to be pursued. The costs in *India* of each suit will follow the result; and their Lordships think that each party should bear their own costs of these appeals.

Agent for Appellants: *T. L. Wilson.*
Agents for Respondents: *Lawford & Waterhouse.*

J. C.*
1872
May 22, 23, 24, 25.

BABOO BISSESSURNATH AND OTHERS . . PLAINTIFFS;

AND

MAHARAJAH MOHESSUR BUX SINGH BAHADOOR AND OTHERS . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Riparian Proprietors—Changes in the Bed of a River—Custom—Ikrarnamah.

There may be a fluctuating boundary (viz., the course of a river) between two zillahs, which by no means affects the rights of landed proprietors.

A custom to the effect that where land which had once been alluvial lies between two branches of a river, or between two rivers, and from time to time the water shifts, so that alternately one of these channels is deep and the other is fordable, then the whole of such intermediate land belongs to the landowner on the side of the channel which at any given time is fordable—in short, that the ownership and right of possession of the whole intermediate tract of land shift with the volume of the water, always attaching to the riparian proprietor on the side of the channel which happens for the time being to be fordable—must be established by very clear and distinct evidence, since the operation of such a custom must be to render the rights of property fluctuating and precarious.

An ikrarnamah between two zemindars as to the mode of determining the boundaries of their estates according as a river becomes fordable on the side of one or other of such estates, whatever may be its effect as between the parties thereto, is not a covenant which will run with the land into the hands of any possessor of it by any title.

APPEAL from a decree of the High Court (June 30, 1863), which reversed a decree of the Judge of *Sarun* (June 27, 1860), which was in the Plaintiffs' favour, the Judge holding that the ikrarnamah hereinafter referred to applied to the lands in suit, and that the effect of it was that the diara lands on the north of the main stream of the *Ganges* should always belong to the zemindars of *Manjhee*, those on the south to the zemindars of *Arrah*.

The facts of the case appear in their Lordships' judgment.

Leith, *Bell*, and *Arathoon*, for the Appellants.

* *Present*:—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

Sir *R. Palmer*, Q.C., *Field*, and *Doyne*, for the Respondents.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

This was a suit to recover possession of a large tract of land which had at one time been alluvial, but which for a great number of years had been regularly cultivated and inhabited, lying between two streams described by the Plaintiffs (who are now the Appellants) as branches of the *Ganges*, but which might perhaps be more correctly described, the one as being the River *Dewha*, and the other as being the River *Ganges*.

The Plaintiffs were the owners of a zemindary, of the name of *Manjhee*, on the north side of the north channel; the Defendants were the owners of a zemindary, of the name of *Arrah*, on the south side of the south channel, both streams flowing from the west and joining each other to the east of the property in dispute.

It appears that the tract of land between these two channels was, as early as the year 1790, in the possession of one *Noorool Hossein*, with whom, as occupier and proprietor, a settlement was made by the Government in the year 1790, and that in the year 1800 a permanent settlement was made with his son.

The Defendants claim the land in question by purchase from a descendant of *Noorool Hossein*, and it appears to be undisputed that *Noorool Hossein* and his heirs and those who succeeded him in title down to the present Defendants have held uninterrupted possession of this land from 1790 to the present day.

The Plaintiffs seek to eject the present possessors, the Defendants, upon these grounds; it appears that in the year 1849 or 1850 the great volume of water left the northern channel and took the southern channel, whereby the northern channel which before had been deep became fordable, and the southern channel which before had been fordable became deep, and they allege that upon that state of facts they are entitled to obtain possession of the whole of the land lying between these two channels, by virtue, first, of an alleged custom, secondly of an ikrarnamah executed in 1780 between the then proprietor of the zemindary *Manjhee* and the then proprietor of the zemindary *Arrah*.

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It is necessary to examine separately these two grounds on which the Plaintiffs rely. First, as to the custom. The custom on which the Plaintiffs rely is nowhere to be found clearly stated in their pleadings, and their counsel found some difficulty in quite accurately defining it. It appears to their Lordships that in order to succeed in disturbing a possession of such long duration, under the circumstances of this case, it is necessary for the Plaintiffs to establish a custom existing in the district in which these properties are situated to the effect that where land which had once been alluvial lies between two branches of a river (or it would appear between two rivers), and from time to time the volume of water shifts so that alternately one of those channels is deep and the other is fordable, then the whole of such intermediate land belongs to the landowner on the side of the channel which at any given time is fordable; in short, that the ownership and right of possession of the whole intermediate tract of land shift with the volume of the water, always attaching to the riparian proprietor on the side of the channel which happens for the time being to be fordable.

It should be observed that this custom appears to be based on the hypothesis that at all times one channel is deep and the other fordable, because it could not apply if both were deep, or both were fordable; it would also appear that this custom is wholly independent of any question of accretion or arrosion of banks; that it attaches merely upon the water becoming deeper or shallower in one channel or the other without necessarily any alteration in the beds or banks of the channels.

This being the custom which it appears to their Lordships that the Plaintiffs are bound to make out in order to establish their case, their Lordships would require to be satisfied by very clear and distinct evidence of its existence, since the operation of such a custom must be to render the rights of property fluctuating and precarious.

A question has indeed been suggested, whether a custom of this description falls within the terms of Regulation XI., sect. 2. Their Lordships, however, do not think it necessary to decide this question, inasmuch as they have come to the conclusion that no "clear and definite usage," such as would be necessary to support

the Plaintiffs' case, has been in point of fact established by the Plaintiffs.

Reference has been made very frequently in the record, and in the course of the argument, to certain proceedings on the part of the Government which took place in 1780, and the ikrarnamahs executed by the proprietors of the respective estates at that time in pursuance of those proceedings; but their Lordships are of opinion that the effect of those proceedings and ikrarnamahs amounts to no more than this: that there being a dispute, indeed a violent quarrel, as it would appear, between two zemindars whose properties were contiguous the one to the other, the Government adopted a settlement at the time between them which appeared to be equitable and expedient, and to be in conformity with what had been done on previous occasions by previous owners of the same properties, and that this arrangement made with these two landowners by the Government was acquiesced in, adopted, and ratified by the ikrarnamahs which have been referred to, which it will be necessary subsequently to state more in detail. This by no means amounts to that clear proof which would be required to support a district custom of this description, and to sustain the claim of the Plaintiffs to transfer to themselves this property from those who have been in possession of it for eighty years or more.

The other evidence which has been relied upon in support of the custom consists mainly of supposed admissions on the part of the Defendants in the course of various legal proceedings: but upon examination those admissions do not appear to amount to more than this, that the Defendants or their predecessors appear in certain proceedings to have insisted upon a rule somewhat similar to that which the Plaintiffs now allege, but by no means identical with it, as applicable to these zemindaries, and do not point to "a clear and definite usage" binding all property within the district.

Reference has been made also to various proceedings with respect to other properties, in which the Government authorities have treated the main channel of the *Dewha* as the boundary between certain zillahs; and to one case in which they appear to have intimated that that boundary should be applied also to certain properties; but the circumstances of these cases are not so dis-

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tinctly before their Lordships that they are enabled to treat them as proof of such a custom as that which has been before described, and upon which it is necessary for the Plaintiff to rely. It may be observed, that it by no means follows that if a certain fluctuating boundary, viz., the course of a river, is adopted between two zillahs, that its adoption for that purpose affects the rights of landed proprietors in those zillahs. The case of *Rae Manick Chund* v. *Madhoram* (1), which has been referred to, is to the effect that there may be a fluctuating boundary between zillahs, which by no means affects the rights of landed proprietors.

Their Lordships are of opinion that sufficient evidence has not been given to prove this custom, which is necessary in order to make out the Plaintiffs' case. They agree, indeed, with Mr. Justice *Raikes*, who says in his judgment: "I think it is fully made out, that when claims were preferred to an island, a new formation in the *Ganges*, by river riparian proprietors, the custom was to award possession to the proprietor on the side on which the alluvial lands were fordable, and if the question before us was for the possession of newly formed lands, and we were asked to apply the custom to such lands, I should have no hesitation in doing so;" but their Lordships also agree with what Mr. Justice *Raikes* further says, "But this is not the nature of the present suit."

Their Lordships are, therefore, of opinion that the Plaintiffs have failed to make out the first ground upon which they rely.

The second ground is the ikrarnamah that was entered into between the then owner of the pergunnah *Arrah*, Rajah *Bickromajeet Singh*, who is the grandfather of the Defendant, and *Tegh Ali Khan*, who was then the owner of pergunnah *Manjhee*, under whom the Plaintiffs claim title; and it is to this effect: The Rajah recites that there had been a suit with respect to diara lands of certain villages which he describes; then that Mr. *Matthew Leslie* and Mr. *Gream* had been sent to survey the land in dispute, and taken the statements of both parties. Then he goes on to say: "The gentlemen of the council of *Azeemabad* and Mr. *Gream* forwarded to the Council at *Calcutta* a report of the dispute between the parties, and a map of the diara lands," which, unfortunately, is not now forthcoming. Then he recites that orders were received

(1) 13 Moore's Ind. Ap. Ca. 1.

from the Council at *Calcutta*, that on whichever side the *Ganges* was fordable the diara lands will appertain to that side; and then that Mr. *Leslie* and Mr. *Gream* came again to the diara lands, "and finding that the River *Ganges* on the side of pergunnah *Arrah*, sircar *Shahabad*, had dried up and was fordable, and on the side of pergunnah *Manjhee* it was a flowing current with deep water, gave possession to me the declarant from 1187 Fuslee of the diara lands aforesaid, with all the crops thereon;" and that he therefore took possession. Then he says: "Therefore I declare and give this writing, that the boundary of the diara between pergunnah *Arrah*, sircar *Shahabad*, and pergunnah *Manjhee*, sircar *Sarun*, has been fixed in this manner, that if the River *Ganges* becomes fordable on the side of pergunnah *Arrah*, the diara lands will belong to the zemindars of *Arrah*, and if it becomes fordable on the side of pergunnah *Manjhee*, sircar *Sarun*, then will belong to pergunnah *Manjhee*. If any or either of us act contrary to this agreement, our act shall be false and void, and we will be liable to punishment by the Government." A duplicate of this agreement was executed by *Tegh Ali Khan*, the then zemindar of *Manjhee*.

It has been contended, on the one hand, that this agreement relates only to newly-formed lands or alluvial lands which may be formed after its date; on the other, that it distinctly refers to the lands in question, at all events in their then state, and that it is applicable to them now. But, be that as it may, assuming the meaning given to this document by the Appellants to be correct, their Lordships are of opinion that whatever may have been its effect as a contract between the two zemindars who executed it, it clearly cannot be binding upon the Defendants, who derive their title from *Noorool Hossein*, who was a stranger to it.

Their Lordships are of opinion that it was not in the power of the then zemindar to impress upon the land a *quasi* servitude, or to burden it with a covenant which would run with it into the hands of any possessor of it by any title.

Their Lordships are therefore of opinion that the Plaintiffs fail also on the second ground of claim.

That being so, it is unnecessary to go into a question which has been raised of the identity of the lands.

For these reasons their Lordships are of opinion that the Plain-

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tiffs fail to make out their case; and they will humbly advise Her Majesty that the decree of the High Court in *India* be affirmed, and that this appeal be dismissed with costs.

Agent for Appellants: *T. L. Wilson.*
Agents for Respondents: *Burton, Yeates, & Hart.*

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RAMCOOMAR KOONDOO AND OTHERS . . DEFENDANTS;

AND

MACQUEEN AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Vendor and Purchaser—Equitable Owner—Purchaser for Value without Notice.

It is a principle of natural equity which must be universally applicable that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by shewing either that he had direct notice, or something which amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it.

APPEAL from a decree of the High Court (April 2, 1869), reversing a decree of the Judge of *Hooghley.*

The facts are stated in the judgment of their Lordships.

Sir *R. Palmer,* Q.C., *Leith,* and *Doyne,* for the Appellants.

Cowie, and *Bell,* for the Respondents.

The cases cited were *Doe* d. *Cullen* v. *Clark* (1); *Ramsden* v. *Dyson and Thornton* (2); *Worthington* v. *Morgan* (3); *Whitbread*

* *Present*:—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

(1) Morton's Rep. p. 76. (2) Law Rep. 1 H. L. 129.
(3) 16 Sim. 547.

v. *Jordan* (1); *Bisco* v. *Earl of Banbury* (2); *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (3).

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

Their Lordships do not think it necessary to call upon Mr. *Leith* to reply, having come to the conclusion that the judgment of the High Court cannot be sustained.

The suit was brought by the Respondents to recover 3½ beegahs of land and some buildings erected upon it situated at *Howrah*, near *Calcutta*. The land had been purchased by the deceased father of the Appellants, *Ramdhone Koondoo*, from a Mahomedan woman of the name of *Bunnoo Bebee*, in June, 1813. Their father, and they, since his death, have held undisputed possession from that time until the present suit was brought, a period of twenty-four years.

The short facts are these: *Alexander Macdonald*, who lived in *Calcutta*, and cohabited with *Bunnoo Bebee* as his mistress, had two children by her—*Alexander Macdonald*, who is dead; and *Maria*, one of the Respondents, who married Mr. *McQueen*, the other Respondent. The father died in 1834. The history of the property appears to be this: The land, which is perpetual lease-hold, at a fixed rent, was conveyed in August, 1831, by the then proprietor to *Bunnoo Bebee* by a deed of sale, and the price paid at that time was only Rs.130. In the following September the deed was registered, and thereupon the zemindar granted a fresh pottah to *Bunnoo Bebee*, at the fixed rent of Rs.35. It does not appear with any certainty that *Macdonald*, the father, was in possession of the land and of the buildings. At all events, it is not clear upon the evidence that he ever resided upon the property. There are two witnesses who speak to his residence. One of them says that he did not live in the new bungalow, and the other says he did. The evidence is far from satisfactory to establish the fact that he really did reside upon the property. But it is clear that, after his death, *Bunnoo Bebee* did go to reside

(1) 1 Y. & C. 303. (2) 1 Ch. Cas. 287.
(3) 9 Moore's Ind. Ap. Ca. 303.

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upon it, and she resided there for some time. She afterwards let it, and received the rent from the tenants. Then, in June, 1843, she sold the property to *Ramdhone Koondoo*, and conveyed it to him by a deed of sale. The price she obtained was Rs.945, and there is nothing to shew that that was not the full value of the property. At the time she sold she made a surrender to the zemindar of the leasehold interest, and a fresh pottah was granted to the purchaser, under which undisputed possession was held for twenty-four years. During that time the purchaser erected important buildings upon the land, and increased the value to such an extent that the property is valued in the present suit at Rs.40,000. *Bunnoo Bebee* died before the commencement of the present suit; there is a contest as to the time of her death, which was material only as regards the question of limitation; and as it is not now necessary to consider that point, it becomes immaterial to determine the precise period of her death, whether in 1856 or 1861. Their Lordships, however, see no reason to dissent from the view which the High Court have taken of that fact in the case.

The claim put forward in this suit is that the purchase, although in the name of *Bunnoo Bebee*, was a purchase benamee by *Macdonald*, that he was the real purchaser, but had used her name in making the purchase. His will is put in evidence, and the Respondents claim under it. Undoubtedly if the purchase was a benamee purchase, they have established a *primâ facie* title to this estate, or at least to a moiety of it.

The answer of the Appellants is, that their father purchased the estate of *Bunnoo Bebee* without any notice of the benamee title, and that they are entitled to hold it, notwithstanding there may have been, originally, a resulting trust in favour of *Macdonald*. It certainly would require a strong case to be established on the part of the Respondents to defeat a possession for so long a period of property for which full value had been given to the person in the apparent ownership of it. The burden of proof lies very strongly on them in such a case. They have of course to establish, in the first instance, the fact that the purchase was really made by *Macdonald*, and with *Macdonald's* money, on his own behalf. Their Lordships cannot help observing that the evidence, even on that cardinal fact, is extremely scanty. It rests almost

entirely on the admission made by *Bunnoo Bebee* in the inventory made by her after *Macdonald's* death, in which she treats the property as part of the estate of *Macdonald*. There is some evidence that *Macdonald* improved the property after the purchase, by building a new bungalow upon it; but that evidence, without the admission, would clearly be insufficient to establish the fact that the purchase, contrary to all the documents, was made by *Macdonald* and with his money. Their Lordships however do not feel it necessary to express any definite opinion upon the fact of the purchase being benamee, having come to the conclusion that, assuming it was so, the Appellants have established their right to hold the property against the benamee title.

It is scarcely suggested that the purchaser had any notice that the title was other than or different from the apparent one. None of the documents give any notice whatever that the transaction was other than it appeared to be. On the contrary, all the documents are entirely consistent with the purchase having been made by *Bunnoo Bebee* herself, or by somebody for her benefit. The case, therefore, cannot be put on the ground of actual notice, but it was said,—and this appears to be the ground upon which the High Court decided in favour of the Respondent,—that there were circumstances which ought to have put the purchaser upon inquiry, and that if he had inquired he might have discovered the real title.

It is not necessary to say whether this case is to be decided upon the principles on which the English Courts of Chancery acts in cases of resulting trusts, when questions arise between the equitable owner and the purchaser for value without notice; or whether it is to be decided upon the general rules of equity and good conscience, which bind the Courts in *India*, because the principle of decision must in either case be the same. It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing, either that he had direct notice, or

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something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it.

The High Court treat the defence as an attempt to introduce "a very peculiar doctrine of the English Court of Chancery." Their Lordships cannot think that this is a correct view of the defence which is set up in this case. It is one to which, no doubt, the Court of Chancery in *England* gives effect, but it only gives effect to it in a peculiar manner, because of the distinction in *England* between legal and equitable estates and legal and equitable remedies. If this case had arisen in *England*, the Respondent would have had no *locus standi* whatever in a Court of Law, and must have resorted to a Court of Equity.

After the discussion which has taken place, the case seems to result in this,—whether or not, under the circumstances of this case, the purchaser ought to have inquired. The High Court think that he ought to have made inquiry, because of the status and position of *Bunnoo Bebee*. The learned counsel who has argued this case for the Respondent does not himself rely upon that circumstance as one which ought to have put the purchaser upon inquiry, and their Lordships cannot see that there is anything in her position as a Mahomedan woman living with her children upon this estate, and sometimes letting it, which should have put anyone upon inquiry whether she was the real owner or not. It is admitted that if an inquirer had gone to the office of the zemindar or to the Public Registry he would have found that she was the owner. She was in possession, and her former life led to no presumption that she might not have had money to purchase for herself, or that others might not have purchased by way of gift to her; on the contrary, the circumstance that she had cohabited with one or two persons of some property might have fairly led to the supposition either that she had acquired money, or that gifts had been made to her for her advancement and comfort in life.

But circumstances have been relied upon at the Bar which were not adverted to by the High Court. In cases of this kind the circumstances which should prompt inquiry may be infinitely

varied; but, without laying down any general rule, it may be said that they must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular inquiry ought to have been made. It is not enough to assert generally that inquiries should be made, or that a prudent man would make inquiries; some specific circumstances should be pointed out as the starting point of an inquiry, which might be expected to lead to some result. Mr. *Cowie*, feeling that the case must really depend upon the existence of such circumstances, has referred to two. First he says, that if any inquiry had been made, it would have been found that *Macdonald* had been in possession, and had improved the property. It has been already observed that the facts do not shew, with anything like distinctness, that *Macdonald* was in possession during his lifetime. There is evidence that he had built upon the property, but supposing inquiry had been made, and the fact ascertained, it would not lead to the inference that, contrary to the apparent title, he had purchased the land for himself; for it is quite probable to suppose that he would spend money to improve property which belonged to the woman with whom he was living.

The other circumstance relied on is, that in the deed of sale itself from *Bunnoo Bebee* to the Appellants' father, she says she made the sale with the consent of her family. If this had been shewn to have been an unusual clause, or that it had been only usual to insert it in deeds where the consent of the family was really required and obtained, there might have been some ground for the superstructure of argument which was built upon it; but their Lordships have no evidence and no suggestion that this is not in common form; on the contrary, it appears that in the deed of sale to *Bunnoo Bebee* herself from her own vendor the same expressions occur. It appears to their Lordships that the clause is one without any specific force or meaning, inserted, like many other general phrases, in Indian deeds, to exclude any possible objection that might be raised against them. It is very like that which so frequently occurs after a full conveyance: "I and my heirs have no longer any claim." Those words are often unnecessary, but they are of very frequent occurrence. Their Lordships therefore think that the two facts relied on as those which ought

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to have put the purchaser on inquiry do not support the contention made at the Bar, and that the whole case of the Respondents fails on its substantial merits.

Other questions have been raised in the case with which it is not now necessary to deal. Their Lordships, in the result, are glad to come to a conclusion by which it is quite evident substantial justice will be done. There has not been a suggestion throughout of any collusion between the purchaser and *Bunnoo Bebee*, or that the purchase was not made entirely *bonâ fide* on his part, and without notice of any title other than that he took from her.

In the result their Lordships will humbly advise Her Majesty to allow this appeal and to reverse the judgment of the High Court. Their Lordships will further advise Her Majesty that the suit be dismissed, and that the Appellants should have the costs in *India* and of this appeal.

Agents for Appellants: *Walters & Gush.*
Agents for Respondents: *Clarke, Son, & Rawlins.*

JUTTENDROMOHUN TAGORE AND ANOTHER . . . . . } DEFENDANTS; J. C.* 1872 Feb. 20, 22, 23; July 5.

AND

GANENDROMOHUN TAGORE . . . . PLAINTIFF.

GANENDROMOHUN TAGORE . . . . PLAINTIFF;

AND

JUTTENDROHOHUN TAGORE AND ANOTHER . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Law (Bengal School)—Inheritance—Gift—Wills—Donee must be in existence when Gift takes effect—Validity of Trusts—Void Limitations—Estates in tail male—Construction.

The following general principles affecting the transfer of property must prevail wherever law exists :—

(*a.*) A private individual who attempts by gift or will to make property inheritable otherwise than the law directs is assuming to legislate, and the gift must fail, and the inheritance take place as the law directs.

(*b.*) With reference to transfers by gift, a beniguant construction is to be used: the real meaning shall be enforced to the extent and in the form which the law allows.

(*c.*) All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such.

Consequently, by Hindu law no person can succeed under gift or will as heir to estates described in the terms which in English law would designate estates tail.

But, *quære*, under such gift or will, whether persons described as heirs in tail are sufficiently designated to take successively by way of gift, subject to defined restrictions; or whether the first taker is to have an estate of inheritance according to law, the residue being rejected as an attempt to impose fetters inconsistent with the law.

By Hindu law, as a general principle, a person capable of taking under gift or will must either in fact or in contemplation of law be in existence at the time when the gift takes effect, *i.e.*, in the case of a will, at the death of the testator. In the latter term are included children in embryo and children subsequently adopted. There may be exceptional cases of provisions by way of contract, or of conditional gift on marriage, or other family provision.

Trusts of various kinds, including implied trusts, have been recognised and

* *Present:*—SIR JAMES W. COLVILE, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, MR. JUSTICE WILLES, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

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acted on amongst Hindus in many cases; and in cases of a provision for charity, or for other beneficent objects, the creation of a trust is practically necessary. The distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one, for the convenience and benefit of another.

But a testator cannot, under the guise of an unnecessary trust of inheritance, indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust. Trusts so created can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognises, and after the determination of those interests the beneficial interest in the residue of the property remains in the person who but for the will would lawfully be entitled thereto.

A Hindu may by gift or will create an estate for life.

Where a testator left the residue of his estate to *A.* for life, with subsequent void limitations, as, for instance, in favour of persons unborn at the death of the testator, and limitations describing an inheritance in tail male; and at the same time it appeared that no estate of inheritance other than the void estate in tail male could be read or deduced from the will:—

Held, that the estates of inheritance and estates or interests subsequent to *A.*'s life interest failed. Limitations over on "failure or determination" of prior estates of inheritance were *held* to be intended to follow the creation of those estates, and consequently to be of no effect when it appeared that such prior estates were illegal and invalid.

Where the will directed the surplus of the personalty, after all annuities and legacies had fallen in and been satisfied, should be paid to the person or persons who for the time being should, under the limitations and directions therein contained, be entitled to the beneficial enjoyment of the real property:—

Held, that the tenant for life was entitled to the interest on such personalty as well after as before the falling in and satisfaction of the legacies and annuities; and that the intention was to establish a trust fund, the interest whereof should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the *corpus* remaining otherwise undisposed of.

Where all existing parties interested under a will are in Court, a declaration as to future rights after the determination of the life interest may be made.

Lady Langdale v. *Briggs* (1) distinguished.

APPEAL from a decree of the High Court (Sept. 1, 1869) which reversed a decree of *Phear*, J. (April 1, 1869) dismissing the suit, and granted part of the relief sought.

Besides the Plaintiff *Ganendromohun Tagore*, two of the Defendants also appealed, viz., *Juttendromohun Tagore* (one of the executors) and *Sourendromohun Tagore*, both claiming beneficial

(1) 8 D. M. & G. 391.

interests under the will. The three appeals were consolidated and heard upon one printed case on behalf of each party.

The facts of the case and the will of *Prosonocoomar Tagore* are sufficiently set forth in the judgment of their Lordships.

Joshua Williams, Q.C., and *J. D. Bell*, for *Ganendromohun Tagore*.

Sir *R. Palmer*, Q.C., *Forsyth*, Q.C., *Cochrane*, *Leith*, and *Doyne*, for *Juttendromohun* and *Sourendromohun*.

It appears from the printed cases that it was contended on behalf of *Ganendromohun* that no bequest can be made by a Hindu, even in *Bengal*, which is inconsistent with the Hindu law affecting gifts. The judgments of Lord *Kingsdown* and Lord Justice *Knight-Bruce* in *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (1) and in *Soorjeemonee Dossee* v. *Denobundhoo Mullick* (2) were referred to, shewing that the power of a Hindu to dispose of property by will in *Bengal* is subject to some restriction. It was submitted that such power does not authorize him to deprive either an only son or an adopted son of his inchoate rights. As to the son's inchoate rights see Sir *F. Macnaghten's* Considerations, c. 1, par. 2; *Doe* v. *Sreemutty Muno Dossee* (3). On the principle that the whole estate of a Hindu who has issue living is inalienable and cannot be given away in his lifetime, it was submitted that the will of *Prosonocoomar*, which made no provision for his only son *Ganendromohun*, either directly or by way of maintenance, was not within the limits which the Hindu law prescribes for alienation by gift, and that *Ganendromohun* was entitled at least to a reasonable maintenance out of the testator's estate.

With regard to the Hindu law of gifts, it was submitted to be that the donor must be absolutely able to dispose of the subject-matter; that the donee must be in existence and ready to accept the gift at the instant of relinquishment by the donor either by himself or his guardian; and that the extent of the property given must be clearly ascertained and undoubted. Such necessary circumstances did not exist in the gifts by this will. A gift, as

(1) 6 Moore's Ind. Ap. Ca. 344. (2) 9 Moore's Ind. Ap. Ca. 135.
(3) Montriou's Rep. 146.

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in this will, which contains a proviso that if the donee shall not take proper care of the subject-matter of the gift he should lose his property in it, is inconsistent with Hindu law.

It was also contended that the will was void so far as it attempted to create estates which, though known to English law, are wholly inapplicable to and unknown by Hindu law and custom. It attempted to create estates tail which it is not competent to a Hindu to create. A life estate similar to the freehold life estate known to English law cannot be created amongst Hindus either in immoveable or moveable property; the only life estates known to the Hindu law being those peculiar estates of Hindu widows, and other females of the family, who take on the death of a husband or father. And if trusts are to be recognised amongst Hindus, they cannot be allowed for the purpose of creating or protecting estates unknown to Hindu law. They cannot be allowed for the purpose of creating perpetuities, or of supporting contingent remainders. Reference was made to *Doorgapershad Roy Chowdhry* v. *Tarrapershad Roy Chowdhry* (1); *Bhoobunmoyee Dabia* v. *Ram Kishoree Acharj* (2); *Rewun Persad* v. *Mussumut Radha Beeby* (3). See also *Kumara Asima Krishna Deb* v. *Kumara Krishna Deb* (4); *S. M. Krishnaramani Dasi* v. *Anandra Krishna Bose* (5).

Further, the gifts to *Juttendromohun* are invalid on account of their vagueness and uncertainty. According to the wording of the will it is wholly uncertain, and depending upon various contingencies whether *Juttendromohun* will be the person to whom the estate, after payment of the legacies and the falling in of the annuities, would have to be made over, and, such being the case, the devise to him is bad for uncertainty. By the will the real estate is given and devised to the trustees named in the will (one of whom has not accepted the gift) upon trust as soon as all the legacies and annuities (save and except the legacy of Rs.1000 a month for the worship of idols revoked by the second codicil) given by the will shall have fallen in, or been paid and fully satisfied, then in trust, forthwith, to convey the said real estate and premises unto and to the use of the person who shall, under the

(1) 4 Moore's Ind. Ap. Ca. 452.
(2) 10 Moore's Ind. Ap. Ca. 311.
(3) 4 Moore's Ind. Ap. Ca. 137.
(4) 2 Beng. L. R. O. C. 11.
(5) 4 Beng. L. R. O. C. 231.

limitations and directions in the will contained, be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions and directions, as are in the will contained and expressed of and concerning the said real estate as far as the then conditions of circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force and apply to the said real estate, or the conveyance or settlement of it, as last aforesaid.

It seems quite uncertain who will be entitled to the beneficial interest in the real estate and premises at the uncertain time when all the legacies and annuities given by the testator's will shall have fallen in, or been paid and fully satisfied, and to whom the trustees are then to convey under the description "the person who shall, under the limitations and directions therein contained, be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed of and concerning the said real estate." The trustees are authorized to make only one conveyance to one person, but whether born or unborn at the death of the testator, or whether for life or for an estate resembling an estate tail, but shorn of the incidents attaching to an English estate tail, or for an estate recognised by or contrary to the laws, usages, and customs of Hindus, seems wholly uncertain. The conveyance, if made at all, is to be made according to the scheme of settlement directed by the testator, which as a whole, it was submitted, is void and impracticable according to Hindu law, as being an attempt to create estates and interests unknown to the laws and usages of Hindus, and as being an attempt to make an illegal and inoperative disposition of his property in contemplation of his decease. Reference was also made to that part of the will which directs that the law of perpetuities in force, when all the legacies and annuities have fallen in or have been paid, is not to be infringed.

Reference was made to Act XXI. of 1870, and to *Indian Succession Act*, 1865, ss. 101, 102, 103. And by Hindu law previous to the passing of the Act of 1870 it was submitted that no one could postpone the vesting of property in another to any future

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period, and render it dependent upon the happening of uncertain contingencies. And as all bequests subsequent to the supposed life estate of *Juttendromohun* are contrary to Hindu law, if the life estate or interest is a good bequest, the dealing with the property on the part of *Juttendromohun* contrary to that clause of the will would, it was submitted, leave the property undisposed of, and it would consequently devolve upon the Appellant as heir of the testator. The heir cannot be disinherited without the estate being validly given over to some other person, and in the event of the donee not accepting, or the gift being in any way invalid, the estate continues in the hands of the heir. There was nothing in the law or practice of the High Court to prevent a final decree being made on the residue of the fourth issue, and as to the effect of the will as to all the so-called devises and bequests: *Lady Langdale* v. *Briggs* (1) not being applicable to the case.

For the Respondents *Juttendromohun* and *Sourendromohun* it was contended that the decree of *Phear*, J., was right so far as it dismissed the Plaintiff's suit, and that the decree of the High Court (Appellate jurisdiction) ought to be reversed except so far as it decreed a benefit under the will to the Respondents. It was rightly decided by the Courts below that a Hindu father has full power under the law of *Bengal* to alienate by will or otherwise the whole of his ancestral and self-acquired estate and property to the complete disinherison of his heirs, and that they (the heirs) are not even entitled to maintenance thereout: *Doe* d. *Munnoo Lall* v. *Gopee Dutt* (2); *The Nuddea Case* (3); *Doe* d. *Juggomohun Roy* v. *Sreemutty Nemoo Dossee* (4). The intention to disinherit was not only clearly expressed but effectually carried out by the devises and bequests, whereby the whole of the moveable and immoveable estate of the testator was legally disposed of. The Judges were also right in declaring that there is no rule in Hindu law against perpetuities, and no express prohibition therein, or in any local Act or Regulation, prohibiting a Hindu from creating or giving successive estates for life, or an estate in tail; and therefore the donees ought to have declared that such estates given by the will were validly

(1) 8 De G. M. & G. 391.
(2) Mort. 80.
(3) 1 Sel. Rep. 2.
(4) Mort. 90.

created: see *Sonatun Bysack* v. *Juggutsoondree Dossee* (1); *Goberdhun Bysack* v. *Shamchand Bysack* (2); *Sreemutty Soorjeemony Dossee* v. *Denobundhoo Mullick* (3). Assuming that it would be against public policy, as laid down in the case just cited, to give complete effect to all the estates tail and executory interests created by the will; then the rule applicable should be one in harmony with the rule of English law to prevent perpetuities, which permits property to be tied up during the existence of any number of concurrent lives and for an additional period measured by the duration of legal infancy and the time of gestation. It is not necessary that the donee under a will should be in existence at the testator's death. See *Rajah Suraneni Venkata* v. *Rajah Suraneni Lakshma* (4); *Shibchunder Ghose* v. *Russickchunder Neoghy* (5). The intention of a testator should be carried out so far as the law will permit, and the testator in this case has expressly declared in his will that its provisions and limitations should be carried out only so far as they can be introduced into any deed of conveyance or settlement without infringing any law against perpetuities which may then be in force and apply to the real estate, and he also expressed his intention in his will thereby to settle and dispose of the whole of his estate generally as fully and completely as the law would permit him to give or control the inheritance for the benefit of the persons specially named in his will, or some or one of them. The Courts ought therefore to have put such construction on the will as would best give effect to and carry out the said expressed intentions of the testator. Reference was made to *Jordan* v. *Adams* (6); *Carter* v. *Barnadiston* (7); *Mackworth* v. *Hinxman* (8). It is also a rule for the construction of wills established for the Courts in *England* (and not of positive law) that expressions which, if applied to real estate would confer an estate tail, shall when applied to personal property simply give the absolute interest. The immoveable estate of a Hindu is free from the incidents and ideas arising out of feudal tenure which are attached to and made to govern and restrict the alienation of

(1) 8 Moore's Ind. Ap. Ca. 66.
(2) Bourke, 282.
(3) 9 Moore's Ind. Ap. Ca. 135.
(4) 13 Moore's Ind Ap. Ca. 113.
(5) Fult. Rep. 36.
(6) 9 C. B. (N.S.) 483.
(7) 1 P. Wms. 505.
(8) 2 Keen, 658.

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real estate in *England*, and is legally undistinguishable in any material respect from moveable or personal estate. The Courts, therefore, ought to have decided according to the rule of the English Courts, and consequently to have decreed that the devisee, who after the death of the last of the persons taking life estates would have been the first entitled to an estate in tail (if valid), should take and hold (instead thereof) the absolute estate and interest vested in the testator at the time of his decease. See *Humberston* v. *Humberston* (1). Further, it ought to have been decreed that the personal estate of the testator (which species of property, even under the English law, has nothing to do with feudal rules as to possession) was, both as to its income and *corpus*, fully and effectually bequeathed to the executors and trustees. The trusts thereof ought to have been declared and enforced after and subject to the payment thereout of debts, legacies, and annuities in favour of the persons beneficially interested therein under the will, the testator's estate having been conveyed to and absolutely vested in the executors and trustees for the benefit of persons other than the Plaintiff, with the additional direction that the Plaintiff, having received sufficient in the lifetime of the testator, was not to take anything under the will or the trusts thereof, it follows that any resulting trust for the Plaintiff was distinctly negatived. According to the true construction of the will, *Sourendromohun*, and failing him, his son, will be entitled in preference to the Plaintiff to the estate immoveable and moveable of the testator, after the determination of the interest given to *Juttendromohun* and his issue, either by the extinction of that branch, or by reason of the devise to the unborn issue of *Juttendromohun* being held to be bad on any ground whatever.

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The judgment of their Lordships was delivered by

MR. JUSTICE WILLES:—

These were consolidated cross-appeals from a decree of the High Court of Judicature in *Bengal* (Appellate side), disposing of numerous questions touching the right of succession to valuable property, partly ancestral and partly acquired, of the late Honour-

(1) 1 P. Wms. 332.

able *Prosonocoomar Tagore*, a Hindu inhabitant of *Calcutta*, who died on the 30th of August, 1868, leaving his only son, the Plaintiff, and two widow daughters, with six grandchildren, the children of daughters him surviving.

The Defendants are three of the trustees and executors under the will of *Prosonocoomar*, dated the 10th of October, 1862, together with the persons in existence who claim a beneficial interest under the will, other than legacies and annuities (which are not disputed). The trustees and executors are *Woopendromohun Tagore*, *Juttendromohun Tagore*, and *Doorgapersaud Mookerjee*.

Juttendromohun Tagore is named as the first tenant for life, and he had, and has, no son.

The Defendant *Sourendromohun Tagore* (named in the will *Shooshendromohun Tagore*) is also named as tenant for life.

The Defendant *Promodecoomar Tagore* (a minor) is the son of *Sourendromohun Tagore*, and was born in the lifetime of the testator. He is described as tenant for life.

The remaining Defendant, *Suttendromohun Tagore* (a minor), is the grandson of *Lullitmohun Tagore*, who was dead at the date of the will. He was born in the lifetime of the testator. His father and grandfather died before the testator. If the will be valid he is entitled to an estate in tail male.

It does not appear that any other person beneficially interested is in existence. The fourth trustee has not acted, though he does not appear to have renounced. No question as to parties has been raised except as to the alleged want of any description of the capacity in which *Juttendromohun Tagore* has been sued. This latter point was not argued before their Lordships, and they see no reason for doubting that the High Court rightly overruled it.

The will provided for the testator's daughters and grandchildren, but made no provision for the Plaintiff, stating that he had been already provided for in the testator's lifetime. That provision was made by nuptial gift on the occasion of the Plaintiff's marriage in the year 1843, when there was settled upon him absolutely, by his father, a zemindary, which then fetched Rs.7000 per annum, and the present value of which the Plaintiff does not state. Upon the death of the Plaintiff's first wife his father also paid him the value of her jewels, to which he laid claim.

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The explanation of the exclusion of the Plaintiff from any further provision by this will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been attempted. Nor does any such question arise as was discussed in *Abraham* v. *Abraham* (1), as to the law applicable to the convert's own property or as to the personal relations of him and his family. The Act XXI. of 1850 appears to their Lordships to be conclusive to shew that this change of religion does not affect the Plaintiff's right of inheritance or suit.

As the present litigation turns upon the validity of the will, it will be convenient to state its effect, citing in terms those parts of it which call for interpretation. It was in the English language.

After reciting that the testator had acquired in severalty large estates, both real and personal, partly ancestral, but for the most part by his personal industry, and that the testator had already made such provision for his son *Ganendromohun Tagore* (the Plaintiff) as he considered sufficient, and that *Ganendromohun Tagore* would "take nothing whatever under the will," it purports to give all the testator's property to four trustees, of whom *Juttendromohun Tagore* was one, "their heirs, executors, administrators, representatives, and assigns," upon trust;—

As to the personalty (except jewels, &c., in the personal use of members of his family, and such jewels, &c., as "the person or persons for the time being beneficially interested in the real estate or the income, or surplus income thereof, shall wish to retain for his and their own use"), to pay funeral expenses, debts, and ordinary legacies within a year after his death, and to sell and to convert the rest into money and securities, and invest the proceeds in the name of the trustees, with power to change the securities.

To pay annuities afterwards given (except Rs.1000 a-month afterwards given for worship) and legacies payable after the investment, and:

"After payment of such annuities and legacies do and shall pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the person or persons who for the time being shall,

(1) 9 Moore, P. C. 195.

under the limitations and directions hereinafter contained and expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits or surplus rents and profits thereof; and so soon as all of the said annuities and legacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust moneys and securities, and the interest, dividends, and annual proceeds thereof, in trust absolutely for the person or persons entitled under the limitations and directions hereinafter contained and expressed, to the beneficial or absolute enjoyment of my said real property."

And as to "realty or immovable property," or of the nature of realty, to apply the profits in aid of the income of the personalty in payment of debts, legacies, and annuities:

To pay Rs.1000 a-month for the worship of idols:

And the residue "to the person or persons" for the time being entitled to the beneficial enjoyment of the real estate under the subsequent directions of the will "for the absolute use of such person or persons respectively;"

And the will desires that the "trustees or trustee shall hold the said real estate generally for the use and benefit of such last mentioned person or persons for the time being, so far as is consistent with the trusts and provisions" of the will; that, after payment of expenses of management, the person or persons for the time being entitled to the beneficial enjoyment of the real property, or of the income or surplus thereof, should receive Rs.2500 a-month, and that the legacies and annuities should be paid gradually out of the balance, with interest at 5 per cent.

The will then directs as follows:—

"And so soon as all the legacies and annuities (save and except the said sum of Rs.1000, for the worship of the said idols), given by this my will, shall have fallen in or been paid and fully satisfied, then in trust forthwith to convey the said real estate and premises unto and to the use of the person who shall under the limitations and directions herein contained be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions and directions as are hereinafter contained and expressed of and concerning the said real estate, so far as the then conditions of circumstances will permit, and so far (but so far only) as such

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limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be)."

All the gifts, &c., in the will are declared to be subject to the bequest to the trustees, and to the provisions and declarations with reference thereto.

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The will, then, after reciting that the testator's father had established certain idols at *Molla Johur*, and had given a talook to supply the means for their worship, and that such provision was insufficient, gives the Rs.1000, before mentioned, per month, for the purposes of the worship.

Provisions follow for the members of his family, other than the Plaintiff, by annuities and legacies, to vest upon the testator's death. Then follow provisions for servants, for charities, and for founding the *Tagore* Law Professorship.

The will then disposes of the real property as follows:—

"And whereas I am, amongst other property, possessed of and entitled to a zemindary or talook called pergunnah *Patleadah*, and kismut *Patleadah*, in zillah *Rungpore*, subject to an annual consolidated jumma, payable to Government, of Rs.40,555: 13*a.* 3*p.*, and I am also possessed of and entitled to other estates and property in zillah *Rungpore* and other districts, and also to a ghaut, which I have erected and built on the river bank side of the *Strand Road* in *Calcutta*, and also to land and buildings opposite thereto, abutting on and near to the said road, and also to the *Boitakhannah House*, land and premises, where I usually reside, and also to various other parcels of real estate. And whereas the frequent division and subdivision of estates in *Bengal* is injurious alike to the families of zemindars and to the ryots, who are in consequence oppressed by numerous and needy landlords having conflicting interests, whence arise disputes and litigations. And whereas I have bestowed much time and money on the improvement of my estates and of the condition of the ryots and tenants thereof, and I am desirous that such improvements should continue to go on, and should not be interrupted by any division of the said

estates or disputes concerning the same: Now, therefore, I give and devise (subject always to the devise to the said *Ramanauth Tagore, Woopendromohun Tagore, Juttendromohun Tagore,* and *Doorgapersaud Mookerjee* hereinbefore contained) all the real property of what particular tenure, nature or kind soever, and also library, horses, carriages, farmyard, furniture of the *Boitakhannah,* jewels, gold and silver plates, &c., which I shall at the time of my death be possessed of or entitled to, to and for the following uses, and subject to the following provisions and declarations, that is to say:—Unto and to the use of the said *Juttendromohun Tagore* for and during the term of his natural life; and from and after the determination of that estate, to the use of the eldest son of the said *Juttendromohun Tagore,* who shall be born during my life for the life of such eldest son; and after the determination of that estate, to the use of the first and other sons successively of the said eldest son of the said *Juttendromohun Tagore,* according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of the said *Juttendromohun Tagore,* who shall be born during my life successively, according to their respective seniorities, for the life of each such sons respectively; and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of the said *Juttendromohun Tagore* and the heirs male of their respective bodies issuing, so that the elder of the sons of the said *Juttendromohun Tagore* born in my lifetime, and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and taken before the younger of the sons of the said *Juttendromohun Tagore* born in my lifetime, and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, to the use of each of the sons of the said *Juttendromohun Tagore,* who shall be born after my death successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and take before the younger of such sons and the heirs male of their and his

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respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, then to the use of *Shooshendromohun Tagore*, the second son of my brother, *Hurrucoomar Tagore*, for the term of his natural life; and after the failure or determination of that estate,—"

Then to the sons of *Sourendromohun Tagore* and their sons and the heirs male of their body respectively, in like manner as for *Juttendro's*, and after the failure or determination of the said several estates and uses, to the first and other sons, and their sons, and the heirs male of their body of *Lullitmohun Tagore* successively, and respectively in like manner as in the case of the sons of *Juttendro* and *Sourendro*. Like limitations as to other persons as to which no further question arises.

Then follows a provision that adopted sons shall be deemed sons of the body within the will, but be postponed to actual issue of the body.

The will then contains a special provision for preserving strictly the character of the estates of inheritance which it proposes to create as follows:—

"And I declare that in the construction of this my will, sons by adoption shall always be deemed younger than and be postponed to sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and, failing descent, by adoption, and his issue or heirs male by descent, and, failing descent, by adoption, shall be preferred to every younger son and his issue or heir male by descent or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate."

It next provides that such estates of inheritance shall not be alienable as follows:—

"And I declare my will and intention to be to settle and dispose of my estate in manner aforesaid as fully and completely as a Hindu born and resident in *Bengal* may give or control the inheritance of his estate, or a Hindu purchaser may regulate the

conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of *England* whereby an entail may be barred, affected, or destroyed."

Then follows a proviso for cesser and limitation over of the estates, whether for life or inheritance, in case of any part of them being permitted by any holder "to be sold for arrears of Government revenues, or in case of failure to keep up in a due state of repair, and to use as his residence in *Calcutta*," the testator's house and furniture, &c., in which case the person next in succession is to take as in case of death.

There follows a power to improve and to make leases for twenty years without fine, and with power of re-entry.

The remainder of the will consists in directions to the trustees as to management and a power of appointment of new trustees in case of death, refusal, or incapacity; and it appoints the trustees to be executors, and gives certain powers to "the acting executors or executor."

There are two codicils. The first makes further provision for the children of a daughter. It speaks of the testator's "trustees or trustee." The second revokes that portion of the will which relates to worship and charity, which it states to have been otherwise provided for by the testator.

The plaint, after stating these facts, alleges that the trustees and executors have, against the directions in the will, improperly sold or disposed of a portion of the corpus of the personal estate, consisting of Company's paper, and that there is danger of future waste.

The plaint prays in substance that it be declared:—

1. That the Plaintiff, as only son and heir-at-law, is entitled to represent the estate.

2. That the testator had no absolute power of disposition, especially of ancestral estate.

3. That the trusts as to the residue, after payment of the testamentary expenses, legacies, and annuities, are void, or at least void save so far as they give *Juttendromohun Tagore* a life interest, and that Plaintiff is entitled after *Juttendromohun Tagore's* death.

4. That the Plaintiff is entitled to an account of the property, and a declaration of the rights of the parties, and incidental relief

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by receiver, injunction, and otherwise for securing his interest, and an adequate maintenance, if he be not declared entitled to an immediate interest, and

5. For further relief.

The answer of the trustees and executors, and that of *Sourendromohun Tagore*, admit the main facts, with some qualifications not at present material; and that of the trustees and executors denies that they have improperly disposed of the estate. They submit that the will is valid, and ask for proper declarations and directions.

The infant Defendants respectively pray that their rights, if any, may be protected by the Court.

The following issues were settled by the High Court:—

"First. Does the plaint disclose any cause of action?

"Second. Did the testator die intestate with respect to any and what portion of his estate?

"Third. Was any and what part of the immoveable property of the testator ancestral estate, and, if so, had the testator power to dispose thereof by will?

"Fourth. Are any and which of the gifts or limitations contained in the will and codicils of the testator void in law?

"Fifth. What are the rights of the parties respectively under the will and codicils?

"Sixth. Whether the Plaintiff is entitled to any and what maintenance out of the estate of the said testator?

"Seventh. Whether the executors, Defendants, have misapplied any and what portion of the testator's estate?"

At this stage, the cause was heard before the High Court (ordinary original civil jurisdiction), and the learned Judge, Mr. Justice *Phear*, dismissed the plaint.

Upon appeal before the High Court (appellate jurisdiction) present Chief Justice *Peacock* and Mr. Justice *Norman*, it was decreed—

(*a.*) That the decree of the Lower Court be reversed.

(*b.*) That the plaint in this suit does disclose a cause of action.

(*c.*) That *Prosonocoomar Tagore*, the testator in the pleadings did die intestate as to certain portions of his property.

(*d.*) That part of the immoveable property of the said testator was ancestral estate, and that he had a right to dispose thereof by will.

(*e.*) That the Plaintiff is not entitled to any maintenance.

(*f.*) That the devises and gifts to *Juttendromohun Tagore* for life are valid, and that (subject to debts, legacies, and annuities), he is entitled during his life to the beneficial enjoyment of the real property, and that he is entitled until the legacies and annuities shall fall in, and be satisfied, to receive the sum of Rs.2500 a month out of the net rents of the immoveable property, and also the surplus rents of the said immoveable property, and the unexpended surplus of the interests, dividends, and annual proceeds of the moveable property which shall, from time to time, remain unexpended.

(*g.*) That the said *Juttendromohun Tagore* is entitled for life to use and enjoy the library, jewels, and other personal property directed to go with the real estate.

(*h.*) That it is not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights so far as they relate to the immoveable property or to any portion of the rents thereof, or as to the surplus income of the personalty, so long as the debts, legacies, and annuities are unsatisfied.

(*i.*) That the trust as to the personal estate, after the annuities and legacies given by the will shall have fallen in and been fully satisfied, is void and invalid, and that the beneficial interest in such personal estate is vested in the Plaintiff, as the heir and representative of the said testator.

(*k.*) That the executors and trustees are bound to render to the Plaintiff an account.

(*l.*) And after disposing of the costs it was ordered and decreed,

(*m.*) That the case be remanded to the Lower Court, with a request that it will try the sixth (1) issue and return its finding thereon, with the evidence to the Appellate Court.

Thereupon appeals were preferred to Her Majesty in Council by the Plaintiff, by *Juttendromohun Tagore* and by *Sourendromohun Tagore* respectively, which have been consolidated, and the case

(1) Intended for the Seventh.

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was argued before this Board, when their Lordships adjourned the hearing in order to allow the Defendant *Suttendromohun Tagore*, who was not represented on the argument, the opportunity of being heard. Of that opportunity he has not availed himself, and the case is ripe for judgment.

The questions presented by this case must be dealt with and decided according to the Hindu law prevailing in *Bengal*, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in *England* are wholly inapplicable to the Hindu system, in which property, whether moveable or immoveable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of *England*, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty, a distinction not known in Hindu law. The only trace of religion in the history of the law of succession in *England* is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property: *Dyke* v. *Walford* (1). In the Hindu law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.

Whilst, however, rules of detail prevailing in *England* are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy (2).

(1) 5 Moore, P. C. 434. (2) Domat, 2413.

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice *Turner* in *Soorjomonee Dossee* v. *Denobundoo Mullick* (1): "A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

Another general principle applicable to transfers by gift (more liberally applied in the law of *England* to wills than to gifts *inter vivos*) is, that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but shewing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in *England*) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass.

If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shewn his intention to create, though he adds a qualification which the law does not recognise.

(1) 6 Moore's Ind. Ap. Ca. 555.

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If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth, for ever to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void.

It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance are void as such, and that by Hindu law no person can succeed thereunder as heir to the estates described in the terms which in English law would designate estates tail.

It remains, however, to be considered whether the persons described as heirs in tail or heirs of inheritance not recognised by law, are sufficiently designated to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power and subject to the restrictions sought to be imposed by the will upon the successive heirs in tail, or whether the language of the will is such as to shew that the first taker was to have an estate of inheritance according to law, and that the words of special inheritance may be said to include such estate at least, and the residue be rejected as an attempt to impose fetters inconsistent with the law.

This makes it necessary to consider the Hindu Law of Gifts during life and wills, and the extent of the testator's power, whether in respect of the property he deals with or the person upon whom he confers it. The Law of Gifts during life is of the simplest character. As to ancestral estate it is said to be improper

that it should be aliened by the holder, without the concurrence of those who are interested in the succession, but by the law as prevailing in *Bengal* at least (1) the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognised as law in *Bengal* that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect so as to fall within the principle expressed in the Dayabhaga, chap. i. v. 21, by the phrase "relinquishment in favour of the donee who is a sentient person." By a rule now generally adopted in jurisprudence this class would include children in embryo, who afterwards come into separate existence.

As to the case of adopted children (so much relied upon during the argument) it is distinguishable because of the peculiar law applicable to that relation. The Hindu law recognises an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognises as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both here and in *India*, proceeding upon the assumption that gifts by will are legally

(1) As to *Madras*, see to the same effect *Valinayagam Pillai* v. *Paehche* (1 Madras, H. C. R. 326; S. C. 1 Norton, L. C. 334.)

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binding, and recognising the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in *India*, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman law, as pointed out by Mr. *E. C. Clark* in his interesting treatise upon "Early Roman Law," p. 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if he had given the property to them in his lifetime. There is no law expressly and in terms applicable to persons who can so take. The law of will has, however, grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord *Wensleydale* in the opinion delivered by him as a Judge in the House of Lords, in the case of *Mirehouse* v. *Rennell* (1) in accordance with principles generally recognised (2). "This case," said Lord *Wensleydale*, "is in some sense new, as many others are which continually occur, but we have no right to consider it because it is new as one for which the law has not provided at all; and because it has not yet been decided to decide it for ourselves, according to our judgment of what is right and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are

(1) 1 Cl. & F. 546.

(2) See this well stated in the introductory disposition of the Civil Code of *Italy*, Article 3, "*Qualora una controversia non si possa decidere con una precisa disposizione di legge, si avrà riguardo alle disposizioni che regolano casi simili o materie analoghe; ove il caso rimanga tuttavia dubbio, si deciderà secondo i principii generali di diritto.*"

not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science." The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

The judgment delivered by the Lord Justice *Knight Bruce* in the case of *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (1), was much relied upon to shew that the English law as to executory devises ought to be applied in dealing with Hindu succession, and Mr. Justice *Phear*, upon the authority of that case, held that, "there is nothing in Hindu law to prevent a testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council) if at all, immediately on the close of a life in being." The expression in the judgment of the Lord Justice thus relied upon, was as follows:—"We are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of *England*) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, and that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist." A consideration of the subject-matter to which these remarks were applied, will, however, at once shew that they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person not in existence, but, whether a

(1) 9 Moore's Ind. Ap. Ca. 135.

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person in existence, and capable of taking under the will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that, if either of such sons died without having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of *Bhoobun Moyee Dabia* v. *Ram Kishore Acharj Chowdhry* (1), in which the testamentary power of disposition by Hindus in *Bengal* was fully recognised, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of *England*, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindus in *India*. It is obvious, therefore, that the conclusion arrived at in the Lower Court as to the result of the judgment in the former case was erroneous.

Their Lordships, for the reasons already stated, are of opinion, that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law, be in existence at the death of the testator.

Their Lordships, adopting and acting upon the clear general principle of Hindu law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu law or usage.

These general preliminaries being laid down, it will be proper next to examine in detail the various questions raised upon the discussion of the particular will, in their natural order, first disposing of those which would apply equally to a gift as to a will, and next, to those which affect the will in question.

It was argued on behalf of the Plaintiff, in the first place, that the will is void by reason of its being founded upon the creation

(1) 10 Moore's Ind. Ap. Ca. 279.

of an estate in trustees, absorbing the whole interest in the property, and out of which the interests of the beneficiaries are to be fed. It was maintained that an estate, to be held in trust, can have no existence by the Hindu law, and that, as the foundation of the will fails, the whole superstructure must fall. This is hardly consistent with the admission in the plaint, and upon the argument, that the legacies and annuities to be paid by the trustees, and which are equally founded upon the trust, are unassailable. The Plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. This argument for the Plaintiff also gives the go-by to the consideration that if the trusts be void, they are not illegal, and that if they are struck out as void, the estates capable of being created by the will, and which the trusts were introduced to secure and maintain, would thereby become impressed directly upon the estate, subject to the charges for legacies and annuities which on all hands are admitted to be valid, as, for instance, upon a gift by a will to receive and pay *A.* an annuity, and subject thereto in trust for *B.*; if the trust be void, it should be simply struck out, and *B.* would have the property, subject to the annuity.

Their Lordships are unable to give any effect to this argument against the admissibility of a trust. The anomalous law which has grown up in *England* of a legal estate which is paramount in one set of Courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu law. But it is obvious that property, whether moveable or immoveable, must for many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognised and acted on in *India* in many cases.

Implied trusts were recognised and established here in the case of a benamee purchase in *Goopeekist Gosain* v. *Gungapersaud Gosain* (1); and in cases of a provision for charity or for other beneficent objects, such as the professorship provided for by the will under consideration, where no estate is conferred upon the

(1) 6 Moore's Ind. Ap. Ca. 53.

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beneficiaries and their interest is in the proceeds of the property (to which no objection has been raised) the creation of a trust is practically necessary.

If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships the contention that under the guise of an unnecessary trust of inheritance the testator could not indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust, their Lordships adopt that argument upon the ground that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognises, and that after the determination of those interests the beneficial interest in the residue of the property remains in the person who, but for the will, would lawfully be entitled thereto. Subject to this qualification, their Lordships are of opinion that the objection fails.

As for the argument that the trust failed because one of the trustees had renounced or more correctly speaking had not acted, their Lordships think this criticism unfounded in law and wholly inapplicable to the will in question, which distinctly provides for the case of a trustee not acting, and gives a directory power to fill up the number of trustees when required.

Having disposed of the question, whether there can be a trust estate, and shewn that the distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one for the convenience and benefit of another, the next subject for consideration involves the objections raised on behalf of the Plaintiff to every beneficiary interest or estate created by the will, except the legacies and annuities. A summary of the provisions and limitations in the will, so far as they affect the parties to this suit, and limited for the present to the real estate and the personalty settled therewith, is as follows:—

Rs.2500 per month to the "*person or persons* for the time being entitled," under the will, "to the beneficial enjoyment of the said real property;"

The residue to go in aid of the income of the personal estate, which is to be first applied in payment of legacies and annuities which are to be paid "gradually and as may be found possible;"

And so soon as the legacies and annuities shall have fallen in or been satisfied, then the trustees or trustee are to convey to the person entitled to the beneficial interest, subject to the subsequent limitations "so far as the terms and condition of circumstances will permit, and so far, but so far only, as such limitations" do not infringe any law then in force against perpetuities, "if any such law there shall be;"

The limitation referred to was as follows in the present tense and therefore to operate at the moment the will took effect, though "subject always to the devise to" the trustees.

1. To the Defendant, *Juttendromohun Tagore*, for life;

2. To his eldest son born during the testator's lifetime for life;

3. In strict settlement upon the first and other sons of such eldest son successively in tail male;

4. Similar limitations for life and in tail male upon the other sons of *Juttendromohun Tagore*, born in the testator's lifetime, and their sons successively;

5. Limitations in tail male upon the sons of *Juttendromohun Tagore*, born after the testator's death;

6. "After the failure or determination of the uses and estates hereinbefore limited" to the (Defendant) *Sourendromohun Tagore* for life;

7. Like limitations for the sons of *Sourendromohun Tagore* and their sons as for the sons of *Juttendromohun Tagore*. Under these limitations the Defendant, *Promodecoomar Tagore*, who was alive at the death of the testator, is (if the will be valid) entitled for life, subject to the life estates of *Juttendromohun Tagore* and of his father;

8. Like limitations in favour of the sons of *Lullitmohun Tagore*, who was deceased at the date of the will, and their sons in tail male, as for the sons of *Juttendromohun Tagore*. Under these limitations (if the will be valid), the Defendant, *Suttendromohun Tagore*, as the son of a son (his father having died during the testator's lifetime) would take an estate in tail male. He is the only Defendant in that situation.

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The will expressly and exclusively adopts primogeniture in the male line through males, preferring the eldest son, and excluding women and their descendants, and all right of provision or maintenance of either man or woman.

Then follows a statement shewing that the testator desired to dispose of his estate "as fully and completely as a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him," but "not subject to any law or custom of *England* whereby an entail may be barred."

This clause shews an intention that each tenant though of inheritance should be prohibited from alienation, a restriction which in *England* could only be imposed by Act of Parliament, as in the case of the settled *Abergavenny* estates, and some others settled upon families ennobled and endowed for public services.

Then follow the residence clauses, by which the estate was to go over in case of non-residence or allowing any part of the property to be sold for Government arrears, with powers to improve and to lease for twenty years.

A glance at this summary of the provisions of the will, with a due regard to the principles already laid down, shews that upon the face of it the will contains a variety of limitations which are void in law, as, for instance, the limitations in favour of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male which is a novel mode of inheritance inconsistent with the Hindu law.

The first life interest in *Juttendromohun Tagore* next requires attention. It was objected to on two grounds. First, because it was said that Hindu law recognises only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life estate, reversion, remainder, and so forth. Secondly, it was said that the life interest was void because of the contingency and uncertainty of the period at which it was to commence, because of the preference given to the legacies and annuities, and to their being payable first out of the interest of the personalty, and then out of the rents of the realty, except the allowance of Rs.2500 per month, so that it is said this life estate may never come into existence, because the legacies and annuities, and interest on arrears, may never be completely satisfied.

As for the first objection, it amounts to this: that because there is, as was contended, only one estate technically known to Hindu law, and that an entirety, there can be no contract by which an owner of land may bind himself to allow to another the enjoyment of the usufruct of the land, to the exclusion of the owner, for a given time, whether for years or for life (because in the law we are dealing with the distinction of chattel and freehold has no existence), and to give exclusive right of possession for the enjoyment of that usufruct. It was admitted for the Plaintiff that annuities given and charged upon land are valid; but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would. In the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that there is no objection to a similar interest being given by will.

As to the second objection to the life interest, namely, the uncertainty of the period at which it was to commence, that objection also exhausts itself upon the enjoyment of the usufruct more or less. The life interest was to begin at once. It was subject to the devise to trustees who were to receive the rents, allow the life-holder Rs.2500 per month out of the net proceeds, apply the remainder in aid of the interest of the personalty, to pay off the legacies and annuities, and, when they were discharged, to allow the life-holder, if he survived so long, or, if not, the succeeding donees in succession to enjoy the whole. If the trust is not to be read to make estates valid which otherwise would be void, so neither is it to be read to defeat interests which without the trust would be valid. Their Lordships read this will alike according to its words and substance, as giving a life interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs.2500 per month, and the expense of

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maintenance, are to be applied in aid of another fund until the legacies and annuities are paid. The law of perpetuity has no application to such a state of things. There is not a single estate or interest in question which would not be valid within the English law of perpetuity, assuming that upon the ground of public policy such law ought to extend to *India*, which the character of the law of gifts there seems to render unnecessary.

Whether *Juttendromohun Tagore* took not merely an interest for life, but by construction of law an estate of inheritance, or whether such an estate of inheritance can be implied in favour of any of his successors, must next be considered. Upon this point it is unnecessary to repeat what has been already said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, different from that prescribed by the law of the land. It is clear that an estate in tail male, such as that which the testator has attempted to create in each series of limitations, is not authorized by Hindu law. It could not exist with the terms of non-alienation attempted to be annexed to it, even in *England*. These would be rejected here as repugnant to a valid estate in tail male created by sufficient words. The general intention to create a known estate of inheritance would be given effect to. The particular intention to deprive it of its legal incidents, would be disregarded as an attempt to legislate. Accordingly it has been argued in support of the will, that as it shews an intention to give an estate of inheritance of some sort, all the machinery by which that estate was to be governed and dealt with after it was created ought to be rejected, and such an estate of inheritance as the law would uphold and sanction ought to be read out of the will and conferred either upon *Juttendromohun Tagore* whose family was intended, so long as it produced males descended of males, to represent the estate described by the testator, by treating his life estate as converted or expanded into an estate of inheritance, according to Hindu law, or at least upon his son to be begotten or adopted, as the first tenant in tail male, whereby the persons designated as heirs could take, though not in the fashion of the testator, at least somehow and to some extent. In order however to arrive at this conclusion, we must find a

general and prevailing intention of the testator, expressed by the words of his will, which will be advanced by this process; and we are not at liberty to invent for him a will which will have the effect of creating an estate at variance not merely in details but in substance and effect with what he has said.

The proposed construction would contradict the will in every particular expressed therein. It would give the father a right of inheritance and a power of disposition when the will says that he shall only hold for life. Testing this alone by English precedents, it might, in order to give effect to a general intent, be sustained by *Nicholl* v. *Nicholl* (1). The proposed construction would give the succession from him to all his sons equally, where the will says that the eldest shall be preferred and have a separate estate of inheritance, and that until that estate fails, the second and so forth shall not succeed. Testing this alone by English precedents it might plausibly be maintained by *Pitt* v. *Jackson* (2). The proposed construction would give succession to women, whom the will excludes. It would let in rights of maintenance which the will negatives. It would let in the power of alienation, which the will forbids. It would defeat the limitation in case of non-residence. It would disregard the provisions as to leasing and improvement, which shew, in common with the rest of the will, that the intention of the testator was to give and to give only such an inheritance as would keep together the property inalienable so long as a male descended in a male line from any of the indicated sources of inheritance should be in existence, and should keep up state in the family mansion. There is no trace to be found in the will of an intention to create any other sort of estate; and the will, as clearly as language can speak without express words, declares that it was not the intention of the testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the testator had used language to describe, however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this will would be something worse than guesswork as to what the testator might

(1) 2 W. Bl. 1159. (2) 2 Brown, C. C. 51.

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have said if he could be asked his meaning; for it would be to contradict in every article what he has intelligibly expressed.

These observations dispose of the case of *Humberston* v. *Humberston* (1), so much relied upon by Sir *Roundell Palmer* in his able argument to sustain this claim to a general estate of inheritance by construction, and also of the other authorities which shew that in order to give effect to the general intention of the testator estates of inheritance will be inferred against the particular expression, in order to benefit as nearly as may be in a lawful way all whom the testator intended to benefit. To infer a general estate of inheritance in this case would at the same time defeat the testator's general intention, and benefit persons other than those he intended to benefit, against established principles of construction, and (again to refer for illustration to English law) against the authority of *Monypenny* v. *Dering* (2). Their Lordships are of opinion that no estate of inheritance other than the void estate in tail male can be read or deduced from the will.

There is, however, another point of view in which the estates in tail male may be regarded, namely, as intended, at all events, to confer an estate for life upon the first taker in existence when the will took effect. The intention of the testator to give at least a life estate to the first taker is clear, and if an estate in tail male stood first in the will, effect might perhaps be given to that intention. There was however no person in existence to take an estate in tail male at the testator's death except *Suttendromohun Tagore*, and the validity of his claim to a life interest in succession stands upon the same ground as that of *Sourendromohun Tagore* and his son, whose position must next be discussed.

Upon this the question arises whether *Sourendromohun Tagore*, *Promodecoomar Tagore*, and *Suttendromohun Tagore* take life interests successively after that of *Juttendromohun Tagore*, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates with which they were linked, and upon the failure or determination of which they were to arise. This may be considered in reference to *Sourendromohun Tagore*, as these other claimants in this respect stand upon a like footing. It may be urged that, as

(1) 1 P. Wms. 332. (2) 2 De Gex, M. & G. 145.

there was at the death of the testator no person to take under the first series of limitations except *Juttendromohun Tagore*, and no person who came into existence afterwards could in point of law so take, there was in law a "failure" of the estates at the death of the testator, which no subsequent event could affect, and that the interest for life after the death of *Juttendromohun Tagore* then became vested in *Sourendromohun Tagore*. The answer is that this argument proceeds upon the assumption that "failure or determination" means failure or determination in law, as if the testator contemplated that his will might be void in law, which, as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground upon the face of the will for supposing that he suspected. The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances, to be conferred.

If *Juttendromohun Tagore* should beget or adopt a son, and die leaving the son and *Sourendromohun Tagore* both surviving, either *Sourendromohun Tagore* (and after him his son) must take at once and enjoy, to the exclusion of the son of *Juttendromohun Tagore*, in spite of the will; or the heir-at-law (who, though in terms excluded from benefit "under the will," cannot be excluded from his general right of inheritance, without a valid devise to some other person) must enter and enjoy during the life of *Juttendro's* son, and of his issue male, actual or adopted, and *Sourendromohun Tagore* (or his son) if he succeeded, must succeed, not as a link in the special chain of succession framed to keep together the family estate, but in turn with the heir-at-law whose intervention was not contemplated by the testator.

If *Juttendromohun Tagore* were to die leaving power to adopt a son who was afterwards, in fact, adopted, *Sourendromohun Tagore* would either enjoy absolutely to the exclusion of the son in spite of the will, or the heir-at-law would enter as before stated.

Many other cases might be supposed, in which the rights of *Sourendromohun* and those who claim after him, instead of forming

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part of a series of estates in successive devisees to fulfil the testator's intention by keeping up the estate and handing it on from one to another whilst there was a male representative of the selected line of limitation and descent, would become a fitful and uncertain enjoyment in turns with the heir-at-law, according to whether there was or was not any person in existence who would, if by law he could, have been a prior taker under the will.

Their Lordships reject the conclusion either that the testator meant to give an uncertain interest of so strange and shifting a character, or that there was an intention to give an absolute estate to precede the prior estates, in the event not appearing to have been contemplated by the testator of the prior estates being void in law. Their Lordships understand "failure or determination" to mean "failure or determination" in fact of an estate or estates which the testator considered sufficient in law, and that these limitations over were in the scheme of this will intended to follow the creation of the prior estates of inheritance and must fall therewith.

Their Lordships are thus of opinion that a life interest has been created in *Juttendromohun Tagore* and that the estates of inheritance and subsequent estates or interests attempted to be created by the will have failed. The decision of the rights in the real estate involves the personalty settled therewith, which calls for no further remark.

There is, however, left the question how far the personalty not settled with the realty but to be made into a distinct fund by the will after the legacies and annuities had been disposed of, ought to be dealt with; whether the bequest of the corpus is void, or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High Court (Appellate jurisdiction). The Chief Justice rejected the words "or persons" as insensible, because only one person could take the beneficial interest in the realty at the same time, and he treated the gift of the fund of money and securities for money as a gift of the corpus

to an uncertain person who might be one of those who for failure of the estate in tail male cannot take the realty. Mr. Justice *Norman* declined to reject the words "or persons," and he suggested amongst others the construction that the person then in possession and his successors should take the entire income and profits without deduction, but he leant to the alternative, that it was uncertain whether the testator meant to make an absolute gift or only to give the interest in succession, *reddendo singula singulis*, and upon this ground he concurred in holding the gift to be void. The decree gives *Juttendromohun Tagore* the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, and excludes him and his successors from any right to the subsequently accruing interest, which is hardly consistent. The intention of the testator, however, appears sufficiently clear to give effect to all the words as follows, viz., that the surplus in the hands of the trustees, and the subsequently accruing interest of the personal fund, is to go in the same line and to the same "person or persons" as were in succession to take a beneficial interest in the realty in the same manner as the rents of the realty. The words "or persons" instead of being rejected as inconsistent with a gift of the *corpus*, ought rather to be taken as conclusive to shew that the intention was to benefit persons taking successively, rendering to each his share of the interest. The word "person" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, because there was only one conveyance to be made for the benefit of all. The words "or persons" in the plural were proper in the clause directing the trustees, not to convey, but to stand "possessed of and interested in the trust moneys and securities, and the interest, dividends, and the annual proceeds thereof in trust" absolutely for the person or persons entitled under the limitations, &c., to the beneficial or absolute enjoyment of the real property. And the use of the plural shews that one person was not to take all, but that several persons were to take, and they could only take in succession under the limitations in the will. The words "absolutely" and "absolute" are used not to indicate that the whole was to go over together but that it was to be enjoyed free from

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the charges in respect of legacies and annuities. No person could be entitled to the "absolute" enjoyment of the real property under the will in the largest sense, and "absolute" is classed by the will with "beneficial," so as to have a distinct meaning as applied to each holder, whether for life or in tail male. The result, in their Lordships' opinion, is, that after the legacies and annuities fall in and are satisfied, the intention was to establish a trust of a fund, consisting of money and securities, the interest of which should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the *corpus* remaining otherwise undisposed of.

In this respect the decree ought, in the opinion of their Lordships, to be varied and a declaration made of the right of *Juttendromohun Tagore*, not only to the surplus interest of the personalty until legacies and annuities fall in and are satisfied, but also to the interest of the personalty after such falling in or satisfaction.

As to the Plaintiff's claim to maintenance their Lordships adopt the conclusion arrived at in the High Court. Without entering into the general question as to how far the testamentary power as to ancestral property can supersede the claim to maintenance, it is enough to say that the claim in this case must be sustained, if at all, upon the footing that the marriage gift ought to be rejected. The Plaintiff admits a marriage gift of his father of real property, producing at the time Rs.7000 per annum, which, *primâ facie*, is an adequate maintenance. He does not state the present income. His averment of its insufficiency is not that it is in fact unreasonable or inadequate, but only that it is insufficient "considering the amount and value of the said *Prosonocoomar Tagore's* property."

The amount of the property, doubtless, is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position or conduct of the claimant (speaking generally and not of the particular claimant) may reduce the maintenance. If the plaint were considered well founded in this respect, a son not provided for might compel a frugal father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon, and than children living as part of his

family must be content with. The only question raised, therefore, is, whether the obligation, moral or legal, of the father to provide a reasonable maintenance for his son, is satisfied by a marriage gift of a *primâ facie* adequate income, and their Lordships are of opinion that such a gift is in its character obviously a provision for maintenance which in this case must be regarded as sufficient, and in respect of which the Plaintiff has laid no foundation for further inquiry, either in law or fact.

The Plaintiff's claim to an account must next be considered. He takes nothing under the will. As heir-at-law he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will, and he is entitled to the protection of the law to keep that inheritance intact until he comes into its enjoyment. He has averred upon information and belief that the trustees "against the directions contained in the will" sold securities for money, consisting of Government paper, "out of the *corpus* of the estate of the said testator and have improperly applied the proceeds thereof." Issue was taken by the trustees upon this averment. In the High Court (original ordinary civil jurisdiction) Mr. Justice *Phear* considered this statement of the Plaintiff insufficient because "the trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personalty; and the selling of the Government paper of which the Plaintiff complains may, as far as anything goes which is stated by the Plaintiff, have been effected for that purpose." The High Court (Appellate jurisdiction) however directed an account, thinking that an averment upon "information and belief" was sufficient as to a fact within the Defendants' knowledge and not within the Plaintiff's, and that the statement as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was inconsistent with a due performance of the trust. In this latter view their Lordships concur, and hold that the Plaintiff is entitled to the account decreed. Whether any further relief should follow must be decreed by the High Court upon the result of the account when taken.

Upon the question whether or not there ought to be made a declaration beyond a mere expression of opinion, as to the rights

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of the parties after the life interest of *Juttendromohun Tagore*, their Lordships are of opinion that such a declaration ought to be made. This case is distinguishable from *Lady Langdale* v. *Briggs* (1), where it was laid down that, generally speaking, it is not according to the course of the Courts in *England* to declare future rights, and it falls within the exceptions there contemplated as possible in the judgment of the Lord Justice *Turner*, page 428; because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose, or may dispose of the rights of those parties, ought to be incorporated in the decree.

As to costs, considering that the important questions litigated have arisen from the novelty and difficulty of the will, their Lordships are of opinion that the costs as between attorney and client of all parties in the Lower Court upon appeal to the High Court (Appellate jurisdiction) and of the appeals to Her Majesty in Council ought to be paid out of the estate, taking first the *corpus* of the personal or moveable estate, and that future costs ought to be reserved until the taking of the account, and be then disposed of by the High Court.

Their Lordships will therefore humbly recommend to Her Majesty that the decree of the High Court (Appellate jurisdiction) be in part affirmed, and in part varied, and that additional declarations of the rights of the parties should be made as follows: that is to say, that the said decree be affirmed so far as it orders that the decree of the Lower Court in its ordinary civil jurisdiction be reversed, and that the plaint in this suit does shew a cause of action, and that the testator died intestate as to certain portions of his property, and that part of the testator's immoveable property was ancestral estate, and that he had a right to dispose thereof by will, and that the Plaintiff is not entitled to any maintenance from the estate of the testator, and that the Plaintiff is entitled to an account as directed by the decree of the High Court (Appellate jurisdiction), and that as to the residue of the said decree, that the same be varied, and the following order and

(1) 8 D. M. & G. 391.

decree substituted for the same: that is to say, that the Defendant *Juttendromohun Tagore* is beneficially entitled to a life interest under the said will in the real or immoveable property, and also in the personal or moveable property vested in the trustees therein mentioned, and directed to be conveyed or converted into a fund respectively, subject to the payments therein directed to be made and to the provisions of the will not hereby declared to be void, and also until the legacies and annuities fall in and are satisfied, to receive Rs.2500 per month out of the net rents of the real or immoveable property, and also the surplus rents of the same and the unexpended surplus of the interest, dividends, and annual profits of the personal or moveable property which from time to time remain unexpended after the payments by the will directed to be made thereout; and also that, subject to the trusts for payment of the legacies and annuities, the said *Juttendromohun Tagore* is beneficially entitled for his life to use and enjoy the library, carriages, horses, farmyard, furniture, jewels, gold and silver plates, and other articles belonging to the said testator, except the jewels, household furniture, and other articles which at the time of the testator's death, was or were in the personal use of any member of the testator's family, which by the will are not, or were not, to be collected, or got in, or sold by the said trustees and executors; and that the limitations in tail male and subsequent limitations in the said will respectively have failed, and are void; and that upon the failure or determination of the life interest of the said *Juttendromohun Tagore*, the Plaintiff, subject to the provisions in the said will not hereby declared to be void, is entitled, as heir-at-law of the said testator, to the real and personal property in respect of the receipt and enjoyment of which the said life interest is declared; and that upon the expiration of the said life interests, and subject to any trust not hereby declared void, the beneficial interest in the said real and personal property is vested in the Plaintiff as such heir-at-law; and that the case be remitted to the Lower Court, with a direction that it shall try the seventh (1) issue, and return its finding thereon, with the evidence to the High Court (Appellate jurisdiction); and that the costs of the parties respectively in the Lower Court of the appeal to the

(1) In the decree, as printed, erroneously called the sixth issue.

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High Court (Appellate jurisdiction), and the costs of the several appeals to Her Majesty in Council, be taxed as between attorney and client, and paid out of the estate, taking first the *corpus* of the personal or moveable property, and that the future costs, if any, be reserved and disposed of by the High Court (Appellate jurisdiction) upon the taking of the account by that Court directed.

Agent for *Juttendromohun Tagore* and *Sourendromohun Tagore*: *Mortimer.*

Agents for *Ganendromohun Tagore*: *J. S. & A. P. Judge.*

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MOLLWO, MARCH, & CO. . . . . APPELLANTS;

AND

THE COURT OF WARDS . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM, IN BENGAL. (1)

Partnership—Agreement with Firm for Commission on Net-Profits and Interest—Cash Advances.

Agreement in writing entered into between *W. & Co.*, British merchants, carrying on business at *Calcutta* with a Hindu Rajah, by which, in consideration of moneys already advanced, and which might be thereafter advanced by the Rajah to them, they agreed to carry on the business subject to the control of the Rajah in several particulars; stipulating that the Rajah should receive a commission of twenty per cent. on all profits made by the firm, until the whole amount of the debt due to him should be paid off, with twelve per cent. interest upon all cash advances which had been, or might be thereafter, made by him to the firm. Further advances having been made by the Rajah to the firm, *W. & Co.* executed to him a mortgage of certain tea plantations, to secure the then amount of his advances, and the Rajah by a deed released his right to commission and interest under the original agreement between them. No proceeds of the business were ever received by the Rajah, and though he was credited in the books of the firm with a considerable sum, that sum was never received by him, and was afterwards written back in the books of the firm. The Rajah did not interfere or exer-

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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(1) See L. R. 4 P. C. 419.

cise any such control in the business as to make him an ostensible partner in the firm:—*Held*, having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of a business made the participant liable as a partner to third parties, and looking at the whole scope of the agreement, the primary object was to give security to the Rajah as a creditor of the firm of *W. & Co.*, and that the participation given him in the net profits of the business was not sufficient to establish a partnership between *W. & Co.* and the Rajah, as regarded third parties.

Although a right to participate in the profits of a trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption, not of law, but of fact, be enforced; yet, whether that relation does or does not exist, must depend on the real intention and contract of the parties.

The cases of *Cox* v. *Hickman* (1) and *Bullen* v. *Sharp* (2) referred to and acted on.

In the absence of any law or established custom existing in *India* in respect to partnership transactions, the law of *England* is to be resorted to for principles and rules to guide the Courts. At the same time the usages of trade, and habits of business of the Indian community, so far as they may be peculiar or differ from those in *England*, are to be taken into consideration.

THIS was an appeal from a judgment of the High Court at *Fort William*, in *Bengal*, in favour of the Respondents, reversing the decree of the Principal Sudder Ameen of the 24 Pergunnahs made in favour of the Appellants.

The suit was brought by the Appellants, who were merchants trading in *London*, against Rajah *Pertab Chunder Sing Bahadoor*, as being jointly liable with the other persons trading as merchants under the style of *Watson & Co.*, in *Calcutta*, in respect of the moneys due to the Appellants in certain transactions and dealings hereinafter mentioned. The Rajah having died after the commencement of the proceedings, the defence of the suit was continued on behalf of his representatives by the Court of Wards, the Respondents in the appeal.

The Appellants, before the transactions under which the suit arose, had carried on business as merchants in *London*, and had had mutual dealings in trade with the firm of *W. N. Watson & Co.*, of *Calcutta*. The dealings consisted in the Plaintiffs' firm and the firm of *W. N. Watson & Co.* mutually consigning goods and merchandize to each other for sale, and in the firm of *W. N.*

(1) 8 H. L. C. 268. (2) Law Rep. 1 C. P. 86.

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Watson & Co. drawing bills of exchange on the Appellants against the goods so consigned by them, which were paid by the Appellants in *London*, and in paying moneys on each other's account in the usnal course of merchants in correspondence with each other.

On the 19th of June, 1865, there was due to the Appellants from the firm of *W. N. Watson & Co.* a balance of Rs.2,92,000. 2*p.* on the account current between the two firms.

The business transactions between the two firms were conducted under the partnership names, but the real question at issue between the parties was, whether or not the Rajah was jointly liable as a partner with *W. N. Watson* and *T. O. Watson*, who were admitted to have been the partners in the firm of *W. N. Watson & Co.*, to pay the balance claimed, or any part thereof.

The issues in the suit, as settled by the officiating Judge of the Court of the 24 Pergunnahs, were:

First, whether the Plaintiffs had dealings with the firm of *W. N. Watson & Co.*, and what was the balance due to the Plaintiffs on such dealings and transactions from that firm. Second, whether the Rajah, the then Defendant, was liable to the Plaintiffs as a partner of the firm of *W. N. Watson & Co.;* and if so, for what time? Third, being held to be a partner, for what amount was the Defendant liable? whether for the whole, or only for a portion?

The Judge thought it more expedient to try the second issue first, and this course was accordingly pursued.

On the 30th of November, 1866, Mr. *Beaufort*, the Judge of the Court of the 24 Pergunnahs, by his judgment on this issue, found that the Rajah was a partner of the firm of *Watson & Co.*, and that his liability commenced on the 27th of August, 1863, and ceased on the 3rd of March, 1865. The other issues were subsequently tried, and by his judgment, dated the 10th of September, 1868, he found that the Appellants were entitled to recover in respect of all the items in the account current except two, which he disallowed for reasons stated in his judgment.

From this judgment an appeal was brought to the High Court of Judicature of *Bengal*, and a Division Bench, consisting of the Justices *Jackson* and *Markby*, reversed the judgment of the Court

of the 24 Pergunnahs, holding that the Rajah was not liable as a partner, or otherwise, to the Appellants for the balance or any part thereof; and from this judgment the present appeal was brought.

The circumstances under which the Appellants contended that the Rajah was liable were as follows:—

T. O. Watson and his son, *W. N. Watson*, commenced trading in partnership in February, 1862, under the style of *W. N. Watson & Co.* They had but little capital, and finding themselves in want of money, applied to the Rajah to assist them. He assisted them during the year 1862 by acceptances, which the *Watsons* did not meet or provide for; the Rajah took them up, and was induced to advance further large sums of money. In January, 1863, he retired an acceptance of Rs.10,000, and others in the following March to the extent of Rs.50,000. In April in that year he advanced Rs.10,000 to the firm, and in the following August Rs.20,000. The business was, in fact, carried on mainly by the Rajah's capital.

On the 27th of August, 1863, an agreement, in the following terms, was made between the *Watsons* and the Rajah, although not signed by the Rajah: "Memorandum of agreement made between Rajah *Pertab Chunder Sing Bahadoor*, of *Pykeparrah*, in the suburbs of *Calcutta*, of the one part, and Messrs. *W. N. Watson & Co.*, of *Calcutta*, merchants, of the other part.

"In consideration of certain sums of money already advanced, and which may hereafter be advanced by the Rajah to Messrs. *W. N. Watson & Co.*, and in consideration of his signing acceptances and other securities for the said *W. N. Watson & Co.*, it is hereby agreed as follows:—

"1st. Henceforth the said *W. N. Watson & Co.* shall not make any shipment without first obtaining the consent of Rajah *Pertab Chunder Sing*, so long as the said firm shall remain in debt to the Rajah, and so long as the liabilities incurred by him in signing acceptances for the firm, or any portion thereof, shall be in existence.

"2nd. Upon such shipments being made, the shipping documents shall be considered at the disposal of the said Rajah *Pertab Chunder Sing*, and that the said firm shall not without his consent

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sell, pledge, or hypothecate them to any person or bank, nor shall the firm apply the proceeds thereof in payment of goods shipped without such consent.

"3rd. Remittances from home in the shape of goods will not be ordered by the firm without the consent of the Rajah.

"4th. No consignment of goods shall be ordered from home by the firm without the consent of the Rajah in writing.

"5th. All remittances received by the firm from home, either in money, goods, or otherwise, shall be made over to the Rajah, and the same shall be under his control. The firm shall sell the goods with the sanction of the Rajah first obtained, and all the proceeds shall, after meeting any debts of the firm to other persons which the Rajah may deem urgent, be retained by the Rajah to extinguish in part or in whole the firm's debt to him, or extinguish wholly or in part the liabilities which he has so incurred as aforesaid; if the remittance be in consignment of the goods, all documents belonging to the same shall be handed over duly indorsed by the firm to the Rajah, and the same shall be wholly at his disposal for the purpose of extinguishing the said debt and liability, subject only to the limitations just above mentioned.

"6th. The proceeds of the sale of any goods consigned free to the firm shall also be made over to the Rajah, and the proceeds shall be remitted to the consignors with the sanction of the Rajah.

"7th. With regard to the conducting of the office business of the firm in detail, the Rajah is to be consulted, and he may direct a reduction or enlargement of the establishment according as he may deem proper.

"8th. No moneys shall be drawn from the firm for the private expenses of any member thereof, or for the conducting of business of the firm, except such sums as the said Rajah shall agree to.

"9th. The Rajah shall have free access to all books, bills, documents, letters, advices, correspondences, and other papers belonging to the firm or relating to its business.

"10th. In consideration of the said advances made, and the liability incurred as aforesaid by the Rajah, and in consideration of any future advances which may be made by him, the firm agrees that he shall receive from them a commission of 20 per

cent. on all net profits made by the firm from time to time, commencing from the 1st of May, 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the liability so incurred by him as aforesaid shall be wholly extinguished.

"11th. As security to the said Rajah for the advances he has made, or which he may hereafter make, and the liability which he has incurred in signing acceptances for the benefit of the said firm, the firm hereby makes over to him the title deeds of their tea plantations at *Cachar*, called *Jeffer Coon Baljore Kishnapore, East Bodreepaul, Central Buddreeparr*, and *West Buddreeparr*, and the firm hereby agrees not to alienate the said plantations until the debts due by them to the Rajah are paid off and his said liabilities extinguished, when the said Rajah is to return the said title deeds to the firm.

"12th. As further security to the Rajah, the firm agree that their other property, landed or otherwise, including their present and future stock-in-trade and outstandings, shall be answerable for the debts due to him, and the liability incurred by him as aforesaid.

"13th. The firm shall in addition to the said commission pay to the Rajah interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the firm, and shall also pay to the banks all discount and interest now as hereafter payable on the said acceptances.

"Dated the 27th day of August, 1863.

"*W. N. Watson.*
"*T. O. Watson.*"

Under the 10th clause of this agreement the sum of Rs.27,458 10*a.* 4½*p.* was on the 30th of September, 1863, written over to the credit of the Rajah in the books of the firm in a separate account opened in his name, and called "Private Ledger for amount of his gain at 20 per cent. on net profit up to 30th April, 1863, as per Journal, Rs.27,458. 14*a.* 4½*p.*"

After the date of this agreement, the Rajah advanced further sums of money. He did not avail himself very largely of the powers conferred upon him by the agreement, and he stated him-

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self, that he did not understand much about commercial transactions; but there was evidence that he recommended clerks for employment by the firm; that he took part in dismissing a clerk; that he came to the office frequently, using the room set apart for the members of the firm, and also the room used by the partners to which persons dealing or having business with the firm had access; that the accounts were offered for his inspection; that he inspected samples of cotton; that the communications from *England* were read to him; that he consulted with the *Watsons* on the business: and that he was present when business was transacted, and took part in it.

It appeared that the *Watsons* held out the Rajah to be a partner to the Plaintiffs and others. It also appeared that the Rajah, subsequently to the entry to his credit of the above sum of Rs.27,458. 14*a*. 4½*p*., drew against the sum; but it appeared further, that afterwards, in March or April, 1864, this sum was written over to his debit in the books of the firm.

In the years 1864 and in 1865, the firm of the *Watsons* fell into great difficulties, and were, in fact, insolvent. In March, 1865, the Rajah executed a deed wherein, *inter alia*, the agreement of the 27th of August, 1863, was recited, and whereby he released and relinquished all claim under the agreement of the 27th of August, 1863, to "the said commission or profits," and all claims to any other moneys, except a sum which was stated in the deed, and which was, by an indenture of even date, secured by a mortgage of the tea plantations at *Cachar*, under the agreement of the 27th of August, 1863.

Shortly after this the *Watsons* became bankrupts.

The Appellants appealed from the final judgment of the High Court, contending, on the facts and evidence, that the judgment of the Court of the 24 Pergunnahs was right, and that the judgment pronounced by the High Court of Judicature was wrong.

The *Solicitor-General* (Sir *G. Jessel*, Q.C.), *Lindley*, Q.C., and *F. M. White*, for the Appellant:—

This is a question of partnership, which must be decided by the true construction of the deed of agreement between the late Rajah *Pertab Chunder Sing* and the Messrs. *Watson*, of the 27th

of August, 1863. The relative position of the parties before that agreement might be, and probably was, only that of debtor and creditor. It appears from the evidence, that the Rajah had advanced, from time to time, very large sums to the *Watsons'* firm to enable them to carry on their business, but there was no written agreement between the parties, and no partnership is alleged to have existed prior to the agreement of the 27th of August, 1863. By that agreement, in consideration of the sums already advanced, and to be advanced, by the Rajah, the Messrs. *Watson* bound themselves to make no shipments without the consent of the Rajah, to hold the shipping documents, and the proceeds of the shipments, at the disposal of the Rajah, not to obtain remittances from home in the shape of goods without his consent, or consignments of goods from home, and to make over to the Rajah, or hold under his control, all remittances received from home, whether in money or goods. Such remittances and their proceeeds were to be held wholly at the disposal of the Rajah for the purpose of extinguishing the debt due by the *Watsons* to him; and even the proceeds of the sale of goods consigned free to the firm were not to be remitted to the consignees without the consent of the Rajah. The *Watsons*, moreover, bound themselves to consult the Rajah in all the details of the business, to regulate their establishment by his directions, to draw no money from the firm for any purpose without his consent, and to allow him free access to all the books and papers of the firm. The Messrs. *Watson* further agreed, that the Rajah should, in consideration of the advances made, liability incurred, and future advances which might be made, receive a commission of 20 per cent. on all net profits made by the firm, from time to time, commencing from the 1st of May, 1862, until such time as the whole of the debts due to him should be paid off and the liability already incurred by him should be wholly extinguished; and the *Watsons* agreed not to alienate certain plantations owned by them, the title deeds of which they made over to the Rajah as security, and gave him a lien on all their property, with a covenant to pay him 12 per cent. interest on all sums advanced, Now, it is in evidence, that the sum of Rs.27,458 was, under this agreement, written over on the 30th of September, 1863, to the credit of the Rajah in the books of the firm, as his commission on

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the net profits up to the end of April in that year. After the date of this agreement he advanced further sums of money to the firm; and though it does not appear that he availed himself very largely of the powers conferred on him by the agreement, yet he attended at the house of business from time to time, and interested himself generally in the concern, consulting with his partners, the *Watsons*, and, if present, taking part in the business of the firm. It is also in evidence that the *Watsons* considered and treated him as their partner, and he is not proved to have done anything himself to disown or disprove that connection. Now, all these circumstances, coupled with the conditions and interests contained in the agreement, constituted, as we maintain, and as was held by the Judge of the 24 Pergunnahs, a valid and subsisting partnership, and rendered the Rajah liable as a partner from the date of the agreement, or, at least, as regards third parties to be treated as the *Watsons'* partner. The Act to amend the law of partnership (28 & 29 Vict. c. 86) did, of course, not exist at the time of these transactions, nor if it had existed would it have applied to *India*, but it shews, when it declares by the 1st section, that a lender is not to be considered a partner, by advancing money for a share of profits, what the law was anterior to that enactment, and we contend, it is now, as regards the circumstances of this case: Act, No. XV. of 1866. The case of *Cox* v. *Hickman* (1), which was relied on in the High Court, and will, no doubt, be relied on by the Respondent here, is distinguishable, and not in point. There some of the creditors were to carry on the business as trustees under the control and for the benefit of the others; and it was held that the creditors were not partners under the deed. So where there is no control or right to interfere, as in the case of the executors of a deceased partner, such executors are no partners: *Holme* v. *Hammond* (2); or of inspectors carrying on the trade of the firm under deed without share of profits or control of the business: *Redpath* v. *Wigg* (3); *Easterbrook* v. *Barker* (4). In *Kilshaw* v. *Jukes* (5), where the agreement was that a party was merely to be repaid a debt out of the profits, if any, of the business, the surplus to belong to other

(1) 8 H. L. C. 268.
(2) Law Rep. 7 Ex. 218.
(3) Law Rep. 1 Ex. 335.
(4) Law Rep. 6 C. P. 1.
(5) 3 B. & S. 847; 22 L. J. (Q.B.) 217.

parties, there was considerable difference of opinion among the Judges as to the effect of the decision in *Cox* v. *Hickman* (1). An agreement for a man to have a share in the profits of the business till a debt is paid makes him a partner: *Bond* v. *Pittard* (2); *Barry* v. *Nesham* (3); *Bloxam* v. *Pell* (4). Any specific participation in the profits creates a partnership: *Ex parte Hamper* (5); *In re The English and Irish Church Ins. Soc.* (6); *Shaw* v. *Galt* (7); *Bullen* v. *Sharp* (8); *Waters* v. *Taylor* (9); *Ex parte Langdale* (10). We maintain, therefore, that the Rajah was a partner in the firm of *Watson & Co.*, and was therefore bound by the acts of his co-partners in the usual course of business; and that, whether he was partner or not, the *Watsons*, as his agents, were authorized to pledge his credit; that he became jointly liable with them to the Appellants, and that the judgment of the Judge of the Court of the 24 Pergunnahs was right and ought to be sustained.

Sir *R. Palmer*, Q.C., *H. James*, Q.C., and *Doyne*, for the Respondent:—

There are no grounds for fixing the Rajah with liability as a partner for the debts of the firm of *Watson & Co.*, or any part of them. The agreement of the 27th of August, 1863, was entered into by *Watson & Co.*, as debtors, with the Rajah, as their creditor, and in no other character; and its stipulations constitute only the terms of an arrangement between the Rajah, as such creditor, and the firm as his debtors, as to the means by which payment of his debt should be provided for and secured. The provision for payment to the Rajah of a commission of 20 per cent., upon the net profits made or to be made by the firm before the debt should be fully discharged, was not a contract for his participation in the profits of the business, nor a contract authorizing *Watson & Co.* to carry on the business for the joint benefit, or on the joint account, of the Rajah and themselves, but was, in effect, nothing more than a stipulation for an addition contingent upon, and proportionate to,

(1) 8 H. L. C. 268.
(2) 3 M. & W. 357.
(3) 3 C. B. 641.
(4) Cited in *Grace* v. *Smith*, 2 W. Bl. 999.
(5) 17 Ves. 403.
(6) 1 Hem. & Mil. 85.
(7) 16 Ir. C. L. Rep. 357.
(8) Law Rep. 1 C. P. 86.
(9) Tudor's L. C. on Mer. & Mar. Law [2nd Ed.], 347.
(10) 18 Ves. 300.

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any profits which might be realized by *Watson & Co.* to the ordinary rate of interest upon the Rajah's debt, such being a lawful stipulation as between debtors and creditor, and in no wise operating to make the creditor a partner in the debtor's business. This is the true and legal effect of the agreement between the parties, and it is preposterous to seek, as the Appellants have done, to make the Rajah liable under it for the entire claims of the Appellants upon *Watson & Co.* for private and partnership debts from the commencement of their mutual dealings to the end of the year 1864. The law applicable to the case has been entirely misconceived by the Judge of the Court of the 24 Pergunnahs, but has been rightly applied by the High Court. The case must be governed by the decision of the House of Lords in *Cox* v. *Hickman* (1), there *Smith & Co.*, trading in that name, becoming embarrassed, executed a deed, to which they were parties of the first part; certain of the creditors, as trustees, of the second part; and the general scheduled creditors (among whom the trustees were named), of the third part. The deed assigned the property of *S. & S.* to the trustees, and empowered them to carry on the business under the name of the "*Stanton Iron Company*," to execute all contracts and instruments necessary to carry it on, to divide the net income to be taken among the creditors in rateable proportions (such income to be deemed the property of *S. & S.*), with power to the majority of the creditors, assembled at a meeting, to make rules for conducting the business or to put an end to it altogether; and after the debts had been discharged, the property was to be re-transferred by the trustees to *S. & S.* Two of the creditors, *C.* and *W.*, were named among the trustees. *C.* never acted. *W.* acted for six weeks and then resigned. Some time afterwards the other trustees, who continued to carry on the business, became indebted to *H.*, and gave him bills of exchange accepted by themselves "*Per proc.* the *Stanton Iron Company.*" It was held, that there was no partnership created by the deed, and that consequently *C.* and *W.* could not be sued on the bills as partners in the company. Now, the effect of this decision was to overrule the conclusion that had before prevailed, that because a man was interested in the profits of a partnership, therefore, he was a

(1) 8 H. L. C. 268.

partner, and to hold that participation in the profits did not of itself constitute a partnership; that it was indeed right, in deciding, whether or no a man was a partner, to consider, whether or no he was interested in the profits; and their Lordships evidently attributed very great weight to that circumstance. But they emphatically put the question upon a wider ground; and the question now is, not did the person sought to be made liable participate in the profits, but has the trade been carried on by persons acting on his behalf? The case of *Cox* v. *Hickman* (1) has been followed and adopted in principle by the Exchequer Chamber in the case of *Bullen* v. *Sharp* (2), from the Common Pleas, where a memorandum of agreement giving a contingent interest in the net average profits of the business of an underwriter, was held not to constitute a partnership. That case overruled the *dictum* in *Grace* v. *Smith* (3), and the judgment in *Waugh* v. *Carver* (4), and upheld the decision of the House of Lords in *Cox* v. *Hickman* (1), which must now be taken to be the only authority on the subject: *Stocker* v. *Brockelbank* (5), *Tudor's* L. C. on Mer. & Mar. Law, 343. *Story* on Partnership, ch. iv., sect. 49 [6th Ed.]; *Lindley* on Partnership [2nd Ed.], pp. 38–9.

The consideration of their Lordships' judgment having been reserved was now delivered by

SIR MONTAGUE E. SMITH:—

The action which gives occasion to this appeal was brought by the Plaintiffs (the Appellants), merchants of *London*, against the late Rajah *Pertab Chunder Sing*, to recover a balance of nearly three lacs of rupees claimed to be due to them from the firm of *W. N. Watson & Co.*, of *Calcutta*.

The Rajah having died during the pendency of the suit, the defence was continued by the Respondent, the Court of Wards, on behalf of his minor heir.

The plaint alleged that the firm of *W. N. Watson & Co.* consisted of *William Noel Watson*, *Thomas Ogilvie Watson*, and the Rajah, and sought to make the Rajah liable as a partner in it.

(1) 8 H. L. C. 268.
(2) Law Rep. 1 C. P. 109.
(3) 2 W. Bl. 998.
(4) 2 H. Bl. 235.
(5) 3 Mac. & G. 263.

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It may be assumed, although the exact amount is a question in dispute in the appeal, that a large balance became due from the firm to the Plaintiffs during the time when it is contended that the Rajah was in partnership with the two *Watsons*.

The questions in the appeal depend, in the main, on the construction and effect of a written agreement entered into between the *Watsons* and the Rajah; but it will be necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two *Watsons* commenced business in partnership, as merchants at *Calcutta*, in 1862, under the firm of *W. N. Watson & Co.* Their transactions consisted principally in making consignments of goods to merchants in *England*, and receiving consignments from them.

In January, 1863, they entered into an agreement with the Plaintiffs regulating the terms on which consignments were to be made between them, and under which *W. N. Watson & Co.* were authorized, within certain limits, to draw on the Plaintiffs in *London* against consignments.

The *Watsons* had little or no capital. The Rajah supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting bills, for which the *Watsons* obtained discount, and which the Rajah met at maturity. In the middle of 1863 the total amount of these advances was considerable, and the Rajah desired to have security for his debt, and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the *Watsons*.

Accordingly, an agreement was entered into on the 27th of August, 1863, between the Rajah of the one part, and "Messrs. *W. N. Watson & Co.*" of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the Rajah to them, the *Watsons* agreed to carry on their business subject to the control of the Rajah in several important particulars, which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title deeds of certain tea plantations, and they also agreed, that "as further

security" all their other property, landed or otherwise, including their stock in trade, should be answerable for the debt due to him.

The 10th and 13th clauses of the agreement were as follows:— [His Lordship read these clauses, *ante*, pp. 90, 91.]

This agreement is not signed by the Rajah, but he was undoubtedly an assenting party to it.

Subsequently to the agreement, the Rajah made further advances, and the amount due to him ultimately exceeded three lacs of rupees.

In 1864 and 1865, the firm of *W. N. Watson & Co.* fell into difficulties. An arrangement was then made, under which the Rajah, upon the *Watsons* executing to him a formal mortgage of the tea plantations, to secure the amount of his advances, released to them, by a deed bearing date the 3rd of March, 1865, all right to commission and interest under the agreement of August, 1863, and all other claims against them.

In point of fact, the Rajah up to this time had never received possession of any of the property or moneys of the firm, nor any of the proceeds of the business, and did not in fact receive any commission. A sum of Rs.27,000 on this account was, indeed, on the 30th of September, 1863, placed to his credit in the books of the firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently "written back" by the *Watsons*.

Some evidence was given as to the extent of the interference of the Rajah in the control of the business. It seems the Rajah knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the case; for it was conceded that the Rajah availed himself only in a slight degree of the powers of control conferred upon him by the agreement: in fact, that he did not more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the Rajah do not in any way add to or enlarge his liability.

Before proceeding to the main questions which have been argued in the appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the Rajah on the ground that he was an ostensible partner,

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and, therefore, liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the *Watsons* to the Plaintiffs, to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the Rajah.

The liability, therefore, of the Rajah for the debts contracted by *W. N. Watson & Co.* must depend on his real relation to that firm under the agreement.

It was contended, for the Appellants, that he was so liable:

First, because he became by the agreement, at least as regards third persons, a partner with the *Watsons;* and

Secondly, because, if not "a true partner" (the phrase used by Mr. *Lindley* in his argument) the *Watsons* were the agents of the Rajah in carrying on the business; and the debt to the Plaintiffs was contracted within the scope of their agency.

The case has been argued in the Courts of *India* and at their Lordships' Bar, on the basis that the law of *England* relating to partnerships should govern the decision of it. Their Lordships agree that, in the absence of any law or well-established custom existing in *India* on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that country to a right decision. But whilst this is so, it should be observed that in applying them, the usages of trade and habits of business of the people of *India*, so far as they may be peculiar, and differ from those in *England*, ought to be borne in mind.

The agreement, on the face of it, is an arrangement between the Rajah, as creditor, and the firm consisting of the two *Watsons*, as debtors, by which the Rajah obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the *Watsons* by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the Rajah as a creditor of the firm.

It was contended at the Bar, that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a

presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances.

It appears to their Lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it. Whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. (See this pointedly stated by Mr. Justice *Blackburn*, in *Bullen* v. *Sharp* (1)). The rule had been laid down with distinctness by *Eyre*, C.J., in *Waugh* v. *Carver* (2), and the reason of the rule the Chief Justice thus states: "Upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of *Grace* v. *Smith* (3), and we think it stands upon fair grounds of reason."

The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the words of Lord *Eldon*) "to a given quantum of the profits."

The distinction was stated to be "clearly settled" and was acted upon by Lord *Eldon* in *Ex parte Hamper* (4), and in other cases. It was also affirmed and acted on in *Pott* v. *Eyton* (5), where *Tindal*, C.J., in giving the judgment of the Court, adopts the rule as laid down by Lord *Eldon*, and says, "Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales (6)."

(1) Law Rep. 1 C. P. 109.
(2) 2 H. Bl. 235.
(3) 2 W. Bl. 998.
(4) 17 Ves. 412.
(5) 3 C. B. 32.
(6) Ibid. 40.

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The present case appears to fall within this distinction. The Rajah was not entitled to a share of the profits "as such;" he had no specific property or interest in them *quâ* profits, for, subject to the powers given to the Rajah by way of security, the *Watsons* might have appropriated or assigned the whole profits without any breach of the agreement. The Rajah was entitled only to commission, or a payment equal in proportion to one-fifth of their amount.

This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords is *Cox* v. *Hickman* (1) and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh* v. *Carver* (2), and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox* v. *Hickman* (1) had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable

(1) 8 H. L. C. 268. (2) 2 H. Bl. 235.

to a creditor of the firm. The reason given in *Grace* v. *Smith* (1), that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner.

Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel.

Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

Numerous definitions by text-writers of what constitutes a partnership are collected at the end of the introduction to Mr. *Lindley's* excellent treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say, that to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common.

It was strongly urged, that the large powers of control, and the provisions for empowering the Rajah to take possession of the consignments and their proceeds, in addition to the commission on net profits, amounted to an agreement of this kind, and that the Rajah was constituted, in fact, the managing partner.

The contract undoubtedly confers on the Rajah large powers of control. Whilst his advances remained unpaid, the *Watsons* bound themselves not to make shipments, or order consignments, or sell goods, without his consent. No money was to be drawn from the firm without his sanction, and he was to be consulted with regard to the office business of the firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be

(1) 2 W. Bl. 998.

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sold or hypothecated, or the proceeds applied, without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt.

On the other hand, the Rajah had no initiative power; he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the *Watsons* to continue to trade, or even to remain in partnership: his powers, however large, were powers of control only. No doubt he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt.

Their Lordships are of opinion, that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the agreement was that of creditor and debtors. The *Watsons* evidently wished to induce the Rajah to continue his advances, and for that purpose were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really founded on the assumption, not of community of benefit, but of opposition of interests.

It may well be, that where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to shew that any other was contemplated; but that is not the present case, where another and different contract is shewn to have been intended, viz., one of loan and security.

Some reliance was placed on the statute, 28 & 29 Vict. c. 86, sect. 1, which enacts, that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a partner, or render him responsible as such. It was argued, that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shewn to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation

of its existence. What may be the effect of the positive enactment contained in the 5th clause of the Act, so far as regards *England*, it is not necessary for their Lordships to consider. The Indian Act, No. XV. of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the Appellants that if "a true partnership" had not been created under the agreement, the *Watsons* were constituted by it the agents of the Rajah to carry on the business, and that the debt of the Plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency which flows from that relation cannot arise, and the relation of principal and agents must on some other ground be shewn to exist. It is clear that this relation was not expressly created, and was not intended to be created by the agreement, and that if it exists it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the Rajah. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of partners was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the *Watsons* and the Rajah so as to create a partnership; and they think there is no sufficient ground for holding that it was carried on for the Rajah, as principal, in any other character. He was not, in any sense, the owner of the business, and had no power to deal with it as owner. None of the ordinary attributes of principal belonged to him. The *Watsons* were to carry on the business; he could neither direct them to make contracts, nor to deal with particular customers, nor to trade in the manner which he might desire: his powers were confined to those of control and security, and subject to those powers, the *Watsons* remained owners of the business and of the common property of the firm. The agreement in terms, and, as their Lordships think, in substance, is founded on the relation of creditor and debtors, and establishes no other.

Their Lordships' opinion in this case is founded on their belief

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that the contract is really and in substance what it professes to be, viz., one of loan and security between debtors and their creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

For the above reasons their Lordships think that the Judges of the High Court, in holding that the Rajah was not liable for the debts of the firm of *W. N. Watson & Co.*, took a correct view of the case; and they will, therefore, humbly advise Her Majesty to affirm their judgment, and to dismiss this appeal with costs.

Solicitors for the Appellants: *Hillyer, Fenwick, & Stibbard.*
Solicitor for the Respondent: *J. H. Wrentmore.*

J. C.* 1872 *July* 30, 31.

WILLIAM HAY (COMMONLY CALLED LORD WILLIAM HAY) . . . . . } APPELLANT;

AND

WILLIAM GORDON . . . . . RESPONDENT.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAUB. (1)

Divorce à vinculo—Act of the Indian Legislature, No. IV. of 1869*—Delay in bringing Suit—Limitation of Suits Act, No. XIV. of* 1859*—Practice—Qualification of Rule with respect to Concurrent Judgments on a Question of Fact.*

The Indian *Divorce Act*, No. IV. 1869, sect. 7, provides, that in all suits and proceedings brought under that Act relief is to be given on principles and rules which, in the opinion of the Courts, are as nearly as may be conformable to the principles and rules which the Court for Divorce and Matrimonial Causes in *England* acts on and gives relief.

The alleged cause of action arose in 1859 or 1860, the misconduct of the wife

Present:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

(1) See Law Rep. 4 P. C. 337.

having come to the knowledge of the husband in 1862. He took no steps till 1869, when he brought a suit in *India*, under Act No. IV. of 1869, for a divorce *à vinculo*, charging his wife with adultery with the co-Respondent *A.* and others. The suit was heard in the absence of *A.*, and the wife did not appear. The Court of first instance dissolved the marriage. On appeal to the Chief Court, application was made to hear further evidence, as provided by the 17th section of the Act, which the Court refused, and by its decree confirmed the sentence of the first Court:—

Held, by the Judicial Committee, that in the absence of *A.*, and the refusal to allow him to be examined to rebut the Plaintiff's case, and considering the inconclusive and unsatisfactory nature of the evidence, coupled with the long delay in bringing the suit, such decree of confirmation could not be maintained, and the sentence reversed, with costs, in the Courts below and on appeal.

The reservations contained in the *Limitation of Suits Act*, No. XIV. of 1859, sect. 1, cl. 16, do not apply to suits for divorce *à vinculo*.

Although, as a general rule, the Judicial Committee will not reverse the concurrent findings of Courts in *India* on a question of fact, yet there may be circumstances to take such findings out of the scope of the general rule, as in the case of a divorce *à vinculo*, in which, by Act No. IV. of 1869, sect. 17, a decree made by the Court of first instance is only binding on confirmation by the Chief Court, which decree is not to be considered as a separate judgment.

IN this case the appeal was brought from the Chief Court of the *Punjaub*, which Court confirmed a decree *nisi* made by the Additional Commissioner of the *Umballa* Division, in a suit for the dissolution of the marriage of the Respondent and his wife.

The suit was instituted by the Respondent under the Indian *Divorce Act*, No. IV. of 1869, intituled an Act "to amend the law relative to Divorce (of persons professing the Christian religion) and Matrimonial Causes in *India*." The Defendants were the Respondent's wife, and the Appellant, who was joined as a co-Respondent.

The Respondent filed his petition on the 25th of June, 1869, in the Court of the District Judge of *Umballa*, and in the petition alleged, amongst other things:—First, that he was on the 19th of July, 1849, married to *Louisa Elizabeth Gordon*, then *Louisa Elizabeth Mercer*, spinster, at *Loodiana*, in the *Punjaub*. Secondly, that from his marriage he lived and cohabited with his wife at different places in *India*, and that there was no issue of the marriage. Thirdly, that in the year 1853, at *Mussourie*, Lieutenant *Watson* (since dead) and the wife of the Petitioner on divers occasions committed adultery together. Fourthly, that in the years 1859 and 1860, at *Simla*, the Appellant, then Deputy Commissioner at *Simla*, and since of No. 2, *Cleveland Row*, *St. James's*,

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London, was in the habit of visiting the house wherein the Petitioner's wife was residing, and she in the habit of visiting the house wherein the Appellant was residing, and that on divers occasions during that period, the dates of which were unknown to the Petitioner, the Petitioner's wife in those houses committed adultery with the Appellant. Fifthly, that in the year 1860 the Petitioner's wife, at *Simla*, committed adultery with divers other persons; and the petition prayed for a dissolution of the marriage, and that the Appellant be condemned in costs.

The petition was personally served upon the Petitioner's wife, who did not appear, and has died since the institution of the suit. The Appellant was also personally served with the petition in the beginning of August, 1869, and on the 13th of that month he forwarded instructions to *India*, and on the 29th of September following, counsel appeared for the Appellant, who by his answer denied the adultery and prayed that the petition might be dismissed as against him.

The cause was assigned for hearing on the 1st of October following, and was, at the instance of the counsel for the Appellant, adjourned to the 15th of that month, when the issues in the cause were settled, and the further hearing was fixed for November following.

No application for any further adjournment was made on behalf of either party, and on the 18th of November, 1869, the cause came on for trial before the additional Commissioner at the Court of *Umballa*, and on that day, and the following day, witnesses were examined and cross-examined on behalf of the Appellant and Respondent, the substance and effect of whose examination is stated and commented upon in their Lordships' judgment.

On the 19th of that month the additional Commissioner, Mr. *J. W. Macnabb*, made a decree *nisi* for the dissolution of the marriage, and condemned the Appellant in costs.

This decree was remitted for confirmation as required by sect. 17 of the Act No. IV. of 1869, to the Chief Court of the *Punjaub*, when the Appellant filed a petition to that Court, submitting the following points:—First, that the suit was barred by limitation and unreasonable delay. Secondly, that the evidence as against the Appellant was not trustworthy, and was insufficient. Thirdly,

that there was no corroboration in the Respondent's letters of the evidence of the witnesses for the Petitioner. Fourthly, that the Appellant had been prejudiced and taken by surprise by the speedy action of the Court below, and by the non-existence of rules of practice. Fifthly, that the Appellant was, and always had been, willing to tender himself as a witness in the cause, but that no special rules had been made, as required by the 62nd section of the *Divorce Act*, No. IV. of 1869, to govern the procedure and proceedings taken under that Act, and he prayed that if the petition was not otherwise dismissed as against him, his evidence might be taken by commission. Sixthly, that, other co-Respondents besides the Appellant should have been cited, and that the omission had prejudiced him in the matter of damages and costs.

The cause came on for hearing before the Chief Court, on the 23rd day of July, 1870, and after hearing counsel on behalf of the Appellant and Respondent, that Court, consisting of the Judges *C. R. Lindsay*, *H. S. Cunningham*, and *J. S. Campbell*, declined to exercise the power vested in the Court under the 17th section of the Act, to direct further evidence to be taken for the Appellant; and after distinguishing the evidence in the cause which the Court held admissible from inadmissible evidence, made a decree confirming the decree *nisi* of the additional Commissioner for the dissolution of the marriage, and condemning the Appellant in costs.

From this decree of affirmance the Appellant brought this appeal.

Dr. *Deane*, Q.C., and *Leith*, for the Appellant:—

This is the first case appealed from *India* under Act No. IV. of 1869, decreeing a divorce *à vinculo* on the ground of adultery on the part of the wife. The only relief before that Act was a sentence of divorce *à mensâ et thoro*. It is an important consideration in this case to observe that the Courts in *India* have erroneously proceeded. Justice has miscarried in the Courts below, particularly the refusal of the High Court on the application of the Appellant for further inquiry and a commission to examine him in *England*, to allow additional evidence to be taken under the powers

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given to the Court by sect. 17 of that Act. The Court ought to have given effect to the Appellant's affidavit, which positively denied the adultery charged, and dismissed the suit, or to have ordered additional evidence. No rules or regulations for the practice of the Court, as directed by the 62nd section, have been issued; therefore, the Court was in this case governed by the rules and principles of the English Divorce and Matrimonial Court. The evidence against the Appellant was untrustworthy and insufficient, The mere inference, or presumption, that the adultery charged had been committed, and upon which the judgments of both Courts were really based, was not justified by the legal evidence in the suit.

Secondly, the Courts ought to have upheld the plea that the suit was barred by the *Limitation of Suits Act*, No. XIV. of 1859, sect. 1, cl. 16, six years having elapsed. Even if the Act did not operate as a bar, the charge being a stale one, and great delay on the part of the Respondent having taken place, his petition ought on that ground alone to have been dismissed.

Pollock, Q.C., and *Pritchard*, for the Respondent:—

First, the *Limitation of Suits Act*, No. XIV. of 1859, sect. 1, cl. 16, cannot apply to a suit for divorce. That Act is limited to the purposes prescribed in it, and no general words of reservation in respect to limitation of suits can be imported so as to operate as a bar to a suit seeking a divorce *à vinculo*. The *Divorce Act* No. IV. of 1869, sect. 7, provides, that the relief shall be governed by the same principles as are administered by the Divorce and Matrimonial Court in *England*. No English Statute of Limitations in this country is a bar to such a suit as this. Secondly, there was no unreasonable delay in bringing the suit; the Appellant was residing in *England*. Thirdly, we submit, that the proceedings in the Court below were in every respect regular. The Appellant was represented by counsel, who had ample opportunity of applying to the Court of first instance to adjourn the cause for examination of the Appellant, if necessary, but he did not do so. Here the native witnesses were examined *vivâ voce* before the district Judge, who was well qualified from personal observation to decide as to the credibility of their testimony. Lastly, it is a general rule

of this tribunal not to disturb concurrent judgments of the Courts below in a question of fact: *Thurburn* v. *Steward* (1).

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is an appeal brought by Lord *William Hay*, the co-Respondent, against a judgment of the Chief Court of the *Punjaub*, confirming a judgment of the additional Commissioner at *Umballa*, whereby Colonel *Gordon* obtained a dissolution of his marriage with his wife on the ground of her adultery with Lord *William Hay*, and Lord *William Hay* was ordered to pay the costs of the suit.

Before the year 1869, the Courts in *India* had only power to decree divorces *à mensâ et thoro*. The power of the Court of Divorce in this country of granting divorces *à vinculo*, was first introduced into *India* by Act, No. IV. of 1862, which by sect. 7 enacts, that subject to its provisions "the High and District Courts shall in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial causes in *England* for the time being acts and gives relief." There is a power given in the 62nd section to make rules and regulations not inconsistent with the Act and the Code of Civil Procedure in *India*. But it appears that no rules or regulations have been made, and, therefore, the principles and rules which obtain in the Divorce Court in this country are, as nearly as may be, to be applied in *India*. Power is given to district Judges, in the first instance, to hear divorce causes, but their decrees are not final, or, indeed, operative at all, until confirmed by the decree of the High Court, which Court is empowered to direct further inquiry to be made or additional evidence to be taken.

In this case the High Court was the Chief Court of the *Punjaub*.

The first question which has been raised is, whether or not the *Act of Limitation of Suits* is a bar to this suit? It is argued that the cause of action arose in the year 1859 or 1860, when the acts of adultery are said to have been committed, or at all events in the year 1862, when Colonel *Gordon* says that the misconduct of his wife came to his knowledge. Act No. XIV. of 1859, after prescribing

(1) Law Rep. 3 P. C. 478.

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particular terms of limitation for certain actions, enacts by sect. 1, cl. 16, with respect to all suits and actions not before specifically provided for the term of six years shall apply, that is six years from the time when the cause of action accrued. Their Lordships are of opinion that the provisions of that Act do not apply to suits for divorce *à vinculo*, which at the time when it passed were unknown in *India*. They are confirmed in the view which they have taken of the intention of the Legislature by the *Limitation of Suits Act*, which was passed last year (Act No. IX. of 1871), which by sect. 1 expressly enacts that its provisions shall not apply to suits under the Indian *Divorce Act*.

The Appellant further relied substantially upon two grounds, the first was that justice had not been done him in this suit, inasmuch as he ought to have had an opportunity of being examined in this Court by a commission; and, secondly, that upon the general merits of the case the decree was wrong.

With respect to the first question, the material facts appear to be these. The alleged adultery was in the years 1859 and 1860. The Petitioner does not aver with any particularity at what time in those years the acts of adultery were committed. Lord *William Hay* left *India* in 1862, and has resided in *England* ever since. In 1862 Colonel *Gordon* says he became aware of his wife's adultery by what he regarded as a confession by her, in a letter which will be subsequently referred to, and that at that time he endeavoured to establish a case by the examination of witnesses in *India;* but it would appear that those very witnesses, who have been now called for him, at that time either could not, or would not, give evidence sufficient to establish his case. This suit was instituted in June, 1869. Lord *William Hay* for the first time heard of it on receiving the summons in the beginning of August in that year. Upon that he immediately took what undoubtedly was the proper proceeding of applying to an able counsel for his opinion, and that counsel advised, in substance, that application should be made to the Court in *India* for further particulars, and upon these particulars being obtained, for a commission for the examination of Lord *William Hay*.

Lord *William Hay*, upon the 13th of August, 1869, wrote to Mr. *Chisholm*, at *Simla*, who held a power of attorney from him, enclosing a copy of his counsel's opinion, and requesting that an

advocate might be retained for him to act upon the instructions therein contained. It appears that Mr. *Cunningham* was so retained, but it does not appear that this gentleman acted in conformity with those instructions, the reasons for his not so acting do not appear.

The cause was heard before the Commissioner of *Umballa*, on the 18th and 19th of November, 1869. The Commissioner pronounced against Lord *William Hay*, decreeing a dissolution of the marriage on the ground of adultery with him, and condemning him in costs. Lord *William Hay* states in his affidavit that he was not aware of this decision until January of the next year, 1870, when he received a short report of the case in the *Mofussilite* newspaper; that he then sent out an affidavit (which appears in the record), denying his guilt, stating a variety of circumstances, and among other things, setting out the opinion of counsel above referred to. In pursuance of that affidavit, and a petition which he also sent to *India*, it appears that his counsel, Mr. *Plowden*, before the Chief Court of the *Punjaub*, upon the 19th of May, presented a petition to that Court, containing various grounds of defence, and stating this, among other things, that "The co-Respondent is, and always has been, willing to tender himself as a witness in the case, and prays that, if the petition be not otherwise dismissed as against him, his evidence may be taken by commission." Upon the hearing of the cause before the Chief Court of the *Punjaub*, in July, 1870, the Court declined to comply with this request, on these grounds; they say: "We see no likelihood of any sort of advantageous result from the issue of a commission. We have Lord *William Hay's* positive denial on oath on the record, and though we should be anxious to offer a litigant so circumstanced every possible facility and indulgence in the hearing of the case, it is not, we think, necessary, and would not, therefore, be expedient now, at the last moment, to re-open the proceedings by the grant of a commission which could scarcely bring any new fact before us, would place Lord *William Hay's* disavowal in no stronger a light, and would postpone the relief prayed for," and the Court subsequently made this observation: "With regard to the co-Respondent, we have further to remark, that his explanation of his proceedings is not, in our opinion, satisfactory, and that we cannot

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regard the course which he has pursued as in any degree adequate to the gravity of the occasion, or as indicating a serious intention to resist the present proceedings."

Their Lordships are not able to agree with the Chief Court that Lord *William Hay's* general denial in the affidavit is at all equivalent to what would or might have been a circumstantial denial by him of the facts stated by the witnesses, or an explanation of these facts, upon an examination by a commission; and they are also unable to agree with the Chief Court in the remark, that they cannot regard the course pursued by him as adequate to the gravity of the occasion, or as indicating a serious intention to resist the proceedings. Their Lordships see no reason to doubt that Lord *William Hay* has all along seriously and earnestly desired to resist these proceedings to the best of his ability.

Upon this part of the case their Lordships have come to the conclusion that it would have been desirable and proper, under all the circumstances, to accede to Lord *William Hay's* application for a commission to examine him.

But their Lordships do not rest their decision upon this ground. After giving the whole case their best consideration, they have come to the conclusion that there is no sufficient evidence upon which this decree against Lord *William Hay* can be supported.

In their Lordships' opinion the evidence against Lord *William Hay* is entirely that of the native witnesses. Before coming to this, however, it is well to make an observation upon other evidence which was admitted in the case, and which undoubtedly was admissible as against the Respondent, Mrs. *Gordon*, viz. her own confessions, or what are contended to have been her own confessions. As far as the correspondence is concerned, the only passage which in any way bears upon her relations with Lord *William Hay*, is the following letter "H," which must have been written somewhere about April, 1862, from *England*, to her husband then in *India*: "I have your letters as to what occurred at *Simla*. *Herbert* always told me that you knew of it, and did not care. Lord *William Hay* told me the same thing. *Herbert* always told me that *Emily* knew of it, and I firmly believe that both you and she did." What she is writing about here is clearly misconduct of her own, and it may be assumed to be adultery with a gentleman

at *Simla*, referred to by the name of *Herbert*. It appears that the person here designated as "*Herbert*" told her that her husband knew of this adultery, and did not care. She also says, "Lord *William Hay* told me the same thing." It appears to their Lordships that the view taken of this expression in her letter by the Court above is more correct than that taken by the Court below, viz. that it does not amount to a confession on her part of any adulterous intercourse with Lord *William Hay*, but merely to a statement of a conversation with him on the subject of her misconduct with another person, and her husband's supposed sentiments regarding it.

On this part of the case—the lady's confessions—a Mrs. *Byrne* is called, who lives at *Simla*, and whose house Mrs. *Gordon* rented. This lady is the grandmother of a Mr. *Johnson*, who was retained in this case to get up the evidence on the part of Colonel *Gordon*, and she does speak to a communication from Mrs. *Gordon* which would undoubtedly lead to the inference that she had committed adultery with Lord *William Hay*. It is certainly somewhat remarkable, as has been forcibly remarked by Dr. *Deane*, that this lady should, if the statement be correct, not have communicated it in 1862 to Colonel *Gordon*, who was then attempting to procure sufficient evidence to obtain a divorce, as Mrs. *Byrne* must probably have well known.

Their Lordships have thought it necessary to say a word upon this part of the case, although no statements of Mrs. *Gordon*, written or verbal, are, according to well-known principles of law, admissible against Lord *William Hay*; and they now refer to the only evidence against him, which is that of the native witnesses. Without going through that evidence in detail, it may be enough to say that part of it is simply hearsay, and of an extremely unsatisfactory and loose character, to say the least of it, such as that of *Boonah*, who speaks of having seen a horse tied up near Mrs. *Gordon's* house at twelve o'clock at night, which she heard from some grooms was the horse of Lord *William Hay*, those grooms not being called. There is evidence of Lord *William Hay* coming to the house on a good many occasions and dining there very frequently, but that is not evidence which, if taken alone, would at all lead to the inference of adultery. There is the evi-

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dence of a *Jampan* bearer to the effect that on three occasions he, together with other bearers (it appears there would be four bearers of the *Jampan*), took Mrs *Gordon* to Lord *William Hay's* house about eight or nine o'clock at night, it does not appear at what time in the year. According to his account, the *Jampan* bearers and the *Jampan* remained outside, visible to all persons who might be passing, which would not point to the conclusion that the visits were of an adulterous or even of a clandestine character. Further, there is the evidence of a man of the name of *Torab*, who had been in the service of Colonel *Gordon* from the year 1856 down to the present time, and this is the only witness who speaks of any familiarities between Lord *William Hay* and Mrs. *Gordon*. His statement is to the effect that Lord *William Hay* frequently came to Mrs. *Gordon's* house when her husband was absent (indeed her husband does not seem to have been much at *Simla*), that Lord *William Hay* came to dinner two or three times a week, sometimes in company, sometimes alone, and the witness goes on to say that, when he would take away the coffee, Mrs. *Gordon* and Lord *William Hay* would be sitting on a sofa together, he with his arm round her waist. This witness appeals in confirmation of his statements to the evidence of an *ayah* of the name of *Peerun*, who, if not supposed to have witnessed the same familiarity, still was constantly in the house, and would, of course, perfectly well know whether Lord *William Hay* was there frequently or not. *Torab* says that the *Ayah* was aware of the frequency of Lord *William Hay's* visits, and of the familiarity between Lord *William Hay* and Mrs. *Gordon*, and that he and the *Ayah* were in the habit of discussing it together, and both of them discussing it with Mrs. *Byrne*. He also states that, in the year 1862, when he was in Colonel *Gordon's* service, upon Colonel *Gordon* questioning him concerning the facts to which he was then deposing, he denied all knowledge of them; he adds, "last year Colonel *Gordon* gave me great encouragement" (*dilasa* is the native word) "to speak the truth, and promised to forgive me everything if I would; then I told the *Sahib*."

The *Ayah*, *Peerun*, upon being called, contradicts the evidence of *Torab;* and is, in fact, a witness in favour of Lord *William Hay*. She, instead of confirming the account which *Torab* had

given as to Lord *William Hay's* frequent visits and his intimacy with Mrs. *Gordon*, says: "I was in Mrs. *Gordon's* service about nine years ago. Know of nothing between her and Lord *William Hay*. He only called on her twice to my knowledge;" this entirely agrees with Lord *William Hay*'s own account in his affidavit, where he says, that he only called twice upon Mrs. *Gordon;* one of his visits being to a certain extent on a matter of business, and that he dined once in the house of Colonel *Gordon*. She does speak, and so does one other witness, to an occurrence, certainly somewhat extraordinary, viz. Mrs. *Gordon* going to Lord *William Hay's* house at night, or late in the evening, breaking some of his windows and cutting some creepers outside the house. *Pursoo*, the other witness who speaks to this transaction, represents that Lord *William Hay* declined to have anything to say to her. He says, "I told the *Sahib;* he said, if she won't go send for the guard, as she was drunk and might strike me with the knife. I persuaded her to go home." That is all we know of that transaction, which certainly appears to their Lordships to be no evidence of adultery.

It has been already said that their Lordships are of opinion that the only evidence against Lord *William Hay* was that of the native witnesses. It is true that the Chief Court does speak of that evidence as being corroborated in one highly important particular by Mr. *Johnson*, the gentleman who was employed to get up the case. But their Lordships do not take the same view of the evidence of Mr. *Johnson*. The passage to which the Chief Court refers would appear to be this: "One morning I was taking my early ride about 7 or 7.30. I saw Mrs. *Gordon* coming down the steps which lead out of *Littlewood;* the *Ayah* was with her. I passed close to her but did not speak; her hair was hanging down." It does not appear to their Lordships that the fact of Mr. *Johnson* meeting this lady between 7 and 8 o'clock in the morning in company with a maid walking down steps, which would seem to be public ones, leading, it is true, to Lord *William Hay's* house, but also to other places, does afford any corroborative evidence which can be relied on of the statements of the native witnesses.

The case, therefore, in their Lordships' view, as far as Lord

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William Hay is concerned, resolves itself into this: the only part of the evidence of any importance is that of a native servant who in 1862 denied all knowledge of what he asserted in 1869, and this servant is contradicted by a fellow servant whom he vouches.

Lord *William Hay* must be taken, as the Chief Court of the *Punjaub* properly assumes, to have given a general denial of the truth of this evidence; if that denial has not been specific, and has not been tested by cross-examination, the fault, having regard to his desire to be examined on commission, cannot be regarded as his.

Under these circumstances, their Lordships have come to the conclusion that this decree cannot be maintained.

Their Lordships are not unmindful that they have on more than one occasion laid it down as a general rule, subject to possible exceptions, that they would not reverse the concurrent findings of two Courts on a question of fact. But they consider that the circumstances of this case are of so peculiar a character as to take it out of the scope of that general rule. They are dealing with a jurisdiction of an important and delicate character, new to the Courts of *India*. This is certainly the first case which has come before their Lordships, and probably not many suits of this description have been tried in *India*. It is to be observed that in this case it can scarcely be said that there have been two separate judgments, inasmuch as the Legislature has not thought it safe to entrust the Court below with the power of pronouncing decisions which would be binding if not appealed against, but have made these decisions operative only on confirmation by the High Court, whose confirmatory judgment is practically the judgment in the suit. It is further to be observed that the Court below was clearly wrong in accepting as evidence against Lord *William Hay* the statements of Mrs. *Gordon*, and regarding those statements as confirming the credibility of the evidence of the native witnesses against him. It is true that the Chief Court distinguishes between the evidence which was admissible as against Mrs. *Gordon*, and that which was admissible as against the co-Respondent. At the same time they attach a good deal of importance to the finding of the Judge below upon the credibility of the native witnesses, based as that finding was in a great measure upon evidence not admissible.

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For these reasons their Lordships have come to the conclusion that it is not one of the cases to which the ordinary rule above mentioned should be applied.

Their Lordships will, therefore, humbly advise Her Majesty to allow this appeal, and to reverse so much of the decree of the Chief Court of the *Punjaub* as is appealed against, and in lieu thereof order that the suit be dismissed as against Lord *William Hay*, with the costs in the Court below and the costs of this appeal.

Solicitor for the Appellant: *G. M. Clements*, for *Bircham & Co.*
Solicitors for the Respondent: *Pritchard & Sons.*

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RAJAH SALIG RAM AND OTHERS . . . . PLAINTIFFS;

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . DEFENDANT.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAUB.

Act of State—Confiscation—Jurisdiction—Circular Orders—Indian Council's Act, 1861.

The status of the King of *Delhi* was that of a king and not a mere jaidadar. The seizure and confiscation in 1857 of the revenues and territories granted to him in 1804 were acts of state, not done under colour of any legal right of which a municipal Court could take cognizance.

Forester v. *Secretary of State of India* (1) distinguished.

Held, also, that the King's ownership of such revenues and territories, according to the true meaning and intent of the grant in 1804, involved no power of disposition, and that all charges and incumbrances created by him out of his estate fell with the estate itself, and could not be enforced either at his death or deposition.

Circular Order, No. 112, issued by the Judicial Commissioner of the *Punjaub* as to the liability of the Government for the debts of rebels whose estates had been confiscated, is not a law within the meaning of 24 & 25 Vict. c. 67.

Lalla Narain Doss v. *The Estate of the ex-King of Delhi* (2) commented upon.

APPEAL from a judgment of the Chief Court of the *Punjaub* (Feb. 14, 1867), affirming the judgments of the Assistant Commis-

* *Present*:—SIR JAMES W. COLVILE, LORD JUSTICE JAMES, SIR BARNES PEACOCK, LORD JUSTICE MELLISH, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

(1) See *ante*, p. 10. (2) 11 Moo. Ind. Ap. Ca. 277.

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sioner of *Delhi* (July 24, 1865) and of the Commissioner of *Delhi* (Jan. 15, 1866). The facts of the case are stated and the nature of the arguments appears in the judgment of their Lordships.

Kay, Q.C., and *Bush Cooper*, for the Appellants.

Forsyth, Q.C., and *Merivale*, for the Respondent.

Some of the cases cited in the arguments were *Forester* v. *Secretary of State of India* (1); *Lalla Narain Doss* v. *The Estate of the ex-King of Delhi* (2); *Elphinstone* v. *Bedin Chand* (3); *Secretary of State* v. *Kamachee Boye Sahaba* (4); *East India Company* v. *Syed Ally* (5).

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The Appellants in this case are the heirs and representatives of Rajah *Salig Ram*, and Rajah *Davee Singh*, the Plaintiffs in the suit. The Respondent, the Secretary of State for *India* in Council, is the Defendant. The suit was commenced on the 28th of November, 1864, in the Court of the Deputy Commissioner of *Delhi*, to recover the sum of Rs.68,853 odd, alleged to be due for principal and interest on certain bonds, which in the plaint are called mortgage bonds, executed by the late King of *Delhi*.

It was correctly stated by Mr. Justice *Boulnois*, in delivering his judgment in the Chief Court of the *Punjaub*, that the bonds all acknowledged debts, but that all did not mention the property by which the debts were secured.

The plaint, after stating that the claim is on four mortgage bonds, of which the dates and amounts are specified, proceeds to describe the grounds of the Defendant's liability in the following words:—

"The Defendant, owing to the late mutiny, confiscated all the landed estate of the late King, but by a Circular, No. 112, of the Judicial Commissioner of these provinces, under the orders of

(1) See *ante*, p. 10.
(2) 11 Moo. Ind. Ap. Ca. 277.
(3) 1 Knapp, P. C. 316.
(4) 7 Moo. Ind. Ap. Ca. 476.
(5) 7 Moo. Ind. Ap. Ca. 555.

the Supreme Government, all mortgages effected by the late King on those estates which the Defendant has confiscated are to be paid. The Plaintiffs having failed in their application to be reimbursed, as will be seen by the proceedings regarding their claim, and having been referred to law to obtain their remedy, are necessitated to file this suit, and pray that a summons may issue against the Defendant, and he be declared to pay the amount claimed with interest at the rate specified in the bonds up to the realization of decree with costs."

The plaint, as pointed out by Mr. *Forsyth*, the learned counsel for the Defendant, is not a suit for ejectment or foreclosure, nor does it pray that the Defendant may be declared a trustee for the Plaintiffs of the revenues collected from the hypothecated villages. It does not even allege that the Defendant, at the time of the commencement of the suit, was in possession of the property. The claim appears in its terms to be founded entirely on a right alleged to have been created by the Circular, No. 112, of the Judicial Commissioner. It is to be remarked that the Plaintiffs do not claim merely the value of the property mortgaged, for, in the 7th Article of their written statement, they say "the Defendant is liable to the full amount of claim though it may exceed the value of the property mortgaged, or return the same to them."

It was in consequence contended by the Respondent's counsel, with great force, that the claimant must be held to the claims actually made by him, and that unless he could succeed in shewing that the Circular had given him the right alleged, his claim must necessarily be dismissed. Having regard, however, to the written statement of the Defendant, the issues raised, and the mode in which those issues were disposed of in the Courts in *India*, their Lordships have in this case thought it right to consider the whole matter as it was presented to those Courts and at their Lordships' Bar.

It must be taken upon the evidence that the late King was, at the time of the confiscation, indebted to the Plaintiffs upon the bonds set forth in the plaint, and that either by the terms of the bonds or by his letters to Sir *Thomas Theophilus Metcalfe*, the Resident at the Court of *Delhi*, the King had, so far as he lawfully

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could, assigned and appropriated to the discharge of the bond debts, certain amounts which the Resident was requested to pay yearly out of the revenues of certain of the royal taiyool villages. It is admitted, in the 1st and 2nd articles of the Defendant's written statement, that the property so alleged to have been mortgaged to the Plaintiffs, was, together with all rights and interests in and in respect of it, seized and appropriated on behalf of the British Crown.

Several defences were set up in the written statement of the Defendant, but for the purpose of this appeal it is not necessary to consider any of them, except the 1st, 2nd, 5th, and 6th. The 3rd, which relied upon sect. 20, Act IX. of 1859, and the 4th, which set up that the Defendant was by Act XXXIV. of 1860 indemnified from all liability of every kind in respect of seizure and appropriation of the property alleged to have been mortgaged, were abandoned by the learned counsel for the Defendant upon the argument of this appeal.

The first ground of defence was that the property alleged to have been mortgaged to the Plaintiffs was, together with all rights and interest in and in respect of it, seized and appropriated by the Defendant on behalf of the British Crown, on political grounds, as an act of state, and that consequently no claim against the Defendant as having thus taken possession of the said property was cognizable in the Court in which the suit was instituted, or in any other municipal Court.

The 2nd was similar to the 1st, with the addition that the seizure was "during the continuance and in the prosecution of war."

The 5th and 6th were as follows:—

"5. That the Circular No. 112, on which the Plaintiffs grounded their right to demand from Defendant the debts they sued for, was simply a private order addressed by one officer of Government in his executive capacity to others, directing them as a matter of mere grace and favour to relax in certain cases, where they would have operated hardly, the laws under which Government was free from legal liability in respect of debts secured on the *Delhi* Crown property, and certain other property which had come into its possession as a consequence of the rebellion and war of 1857,

and that the issuing of such an order could be of no effect whatever to bind the Government as Defendant in a municipal Court.

"6. That the said Circular did not authorize the exercise of this grace and favour in respect of the debts claimed by the Plaintiffs, as was clear from the wording of the said Circular, and as was further clear from the Circular 5 of 1861."

Several issues were raised; of these the only important ones to be considered are, the 1st, 4th, 5th, and 6th.

They are as follow:—

"1. Was the seizure of these properties by Government such an act of state or act of war as is not cognizable by a municipal Court?

"4. Has the Circular in question the force of a legislative enactment?

"5. Do the Circulars issued by the Judicial Commissioner of the *Punjaub*, in his executive capacity, bind the Courts of the *Punjaub* or not?

"6. Does Circular 112 apply to the debts claimed by the Plaintiff?"

The case was tried by Mr. *Coldstream*, the Deputy Commissioner of *Delhi*, who, in a very elaborate and well considered judgment, found those issues for the Defendant, and gave judgment in his favour. A regular appeal was preferred from that judgment to the Commissioner of *Delhi*, who upheld the decision of the Assistant Commissioner.

A special appeal was then presented to the Chief Court of the *Punjaub*. That appeal was dismissed, upon the ground that the suit was not cognizable in a municipal Court. The appeal to Her Majesty in Council is expressed to be against the judgment of the Chief Court of the *Punjaub*, and the several judgments of the Commissioner and Deputy Commissioner of *Delhi*. There is no dispute, however, as to the facts, and the questions now to be considered are whether the seizure or confiscation of the property of the late King was an act in respect of which the Municipal Courts have jurisdiction; whether the Circular Order of the Judicial Commissioner, No. 112, vested a right of action in the Plaintiffs which can be enforced against the Government by a

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Court of Law; and whether the Plaintiffs had a right or interest in the property which was not affected by the confiscation of the King's domains. The last was the proposition mainly relied on by the Appellants' counsel before their Lordships.

The Commissioner of *Delhi* remarked in his judgment "that in the use of the words 'confiscation' and 'seizure' and 'appropriation,' the Court did not perceive any material distinction or difference, and one of the grounds of appeal to the Chief Court was, that the ruling of the Commissioner as to the meaning of those words was erroneous. The Appellants say, in the second ground of their appeal, 'the King of *Delhi's* property was confiscated,' and the Appellants do not dispute the right of Government to confiscate it; but the King had only a right to that which remained after satisfying the Appellants' claim, and to this alone is the Defendant entitled by virtue of confiscation. The Appellants' property was not confiscated."

Mr. *Kay*, in his argument, treated the word "confiscated" as if it were used in the sense of forfeited for a crime, and he cited cases to shew the distinction between "forfeiture" and "escheat." The former, he urged, did not affect *bonâ fide* incumbrances created by the offender before forfeiture. He admitted that the confiscation was an act of state, but he denied that it affected the rights which the Plaintiffs had derived from the King by virtue of the mortgages. His argument as regards the effect of a forfeiture upon a regular conviction for a crime would have been correct if he could have shewn that the confiscation of the King's property was an act in the assertion of a right conferred by the law of forfeiture. But such was not the case. Neither was the law of forfeiture in force in the case of natives of *India* convicted of crimes beyond the limits of the Supreme Court, whatever might have been the case within those limits (as to which it is not necessary to express an opinion), nor did the Government affect or purport to act under any such law.

The word "confiscation" as used by the Commissioner of *Delhi*, in his proceeding of the 3rd of October, 1857, does not import that the appropriation to the public use was for a crime. He says, the confiscation of all the Crown villages, &c., *having been deemed proper*, &c., it is ordered, &c., that perwannahs be issued

to the Tehseeldahs, &c., to confiscate all the villages, &c. In other words, the revenues were to be brought into the public treasury. The word "confiscation" does not, *per se*, necessarily import that the appropriation is to be made as a penalty for a crime; and even when used in that sense, it does not necessarily imply that the forfeiture has accrued upon conviction, but may also be properly used as applicable to appropriations by Government as an act of state of the property of a public enemy, or of a subdued or deposed ruler.

The Deputy Commissioner found as a fact, that which is well known as a matter of history, that the King was not tried by a regular Court, and that his trial by a Court under a Special Commission did not take place for some months after the attachment had taken place.

Mr. Justice *Boulnois*, in his judgment, says, "after the mutiny in 1857, on the 18th of September in that year, the King of *Delhi* was captured by the British Government, and made a prisoner of war, having been for some time the nominal head of the insurgents in *Delhi*. On the 3rd of October in that year, the Commissioner of *Delhi*, on behalf of the Government, attached and took possession of the ex-King's lands. This appropriation accompanied the extinction of the political existence of the representative of the *Delhi* line of kings. It did not affect to justify itself on any ground of municipal law; and it seems to have been (considering the person who had owned the property seized) an act of power on the part of the British Government exercised in a matter of state. There is, however, additional evidence to shew that the authority of Government in that character, which renders it superior to positive law, was brought to bear in this act, for the seizure of the King's lands was an appropriation of an enemy's property *flagrante bello*."

It is not necessary to express an opinion as to what is the effect of the seizure of property of a subject by a government in the exercise of the powers of war in putting down an insurrection, especially in those cases in which the subject has not joined in the insurrection: nor is it necessary to deal with the cases which have been cited from the American Reports in regard to acts which took place during the late war in that country. The case

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of the Plaintiffs, who claim under grants from the King, is very different from that of a subject deriving title under an ordinary tenure.

It is necessary to consider under what circumstances the late King of *Delhi* acquired a title to the property charged with the payment of the bond debts, if, indeed, he can be held to have had any legal title whatever to the same, beyond the mere will of the British Government. As to this point, it appears that, after the Emperor *Shah Alum*, the grandfather of the late King, had been rescued from the power of *Dowlut Rao Scindia*, and placed under the protection of the British Government, it became a matter of political expediency to determine the nature and extent of the provision to be assigned for the support of His Majesty and of the Royal household.

The subject was fully discussed in the notes of instructions transmitted by Mr. *Edmonstone*, the Secretary to Government, to Colonel *Ochterlony*, the Resident at *Delhi*, in a letter dated the 17th of November, 1804 (4 *Wellesley* Despatches, 237), of which notes a copy was also dispatched to his Excellency the Commander-in-Chief. Subsequently, on the 23rd of May, 1805, the final determination of the Governor-General in Council upon the subject was communicated to the Resident at *Delhi*, by letter, from the Secretary to Government of that date (see same vol., p. 542).

That arrangement was as much an act of state as if it had been carried into effect by formal Treaty signed by the British Government.

Municipal Courts have no jurisdiction to enforce engagements between Sovereigns founded upon Treaties: *East India Company* v. *Syed Ally* (1); *The Nabob of the Carnatic* v. *The East India Company* (2). The Government, when they deposed and confiscated the property of the late King, as between them and the King did not affect to do so under any legal right. Their acts can be judged of only by the law of nations: nor is it open to any other person to question the rightfulness of the deposition, or of the consequent confiscation of the King's property.

If, shortly after the arrangement had been made, the British Government had found it necessary as a matter of political expe-

(1) 7 Moore's Ind. Ap. Ca. 555. (2) 2 Ves. Jun. 56.

diency to alter without the consent of *Shah Alum* the arrangements introduced into the assigned territory, it is impossible to conceive that a Court of Law would have had jurisdiction to enforce the arrangement in a suit brought by His Majesty, either by granting a specific performance or by awarding damages for the breach of it.

The King of *Delhi* having joined in hostilities against the British Government, having renounced their protection and having endeavoured to regain his former absolute rights of sovereignty, the British power over those territories which had been assigned for his support was for a time suspended. *Delhi* fell before the British arms, the territories were recaptured, the power of the British Government was restored, and the King of *Delhi* was taken as a prisoner of war. The revenues and territories which in 1804 were by an act of state assigned for the maintenance of *Shah Alum* and his household were in 1857, also by an act of state, resumed and confiscated.

The seizure and confiscation were acts of absolute power, and were not acts done under power of any legal right of which a Municipal Court could take cognisance.

The *status* of the ex-king was that of a king. He was treated and recognised by the British Government as a king and not merely as a jaghiredar holding under an ordinary grant from the British Government. He was the grandson of *Shah Alum*, and neither he nor any of his ancestors had ever been deposed by his own subjects or by the British Government or by any other power. *Shah Alum* was described, by Lord *Wellesley* in his despatches, sometimes as the "unfortunate representative of the house of *Timour*," sometimes as "the Moghul" and, again, as "the Emperor." It is unnecessary here to refer more particularly to the extracts from the despatches which have been pointed out in the exhaustive arguments in the Lower Courts. If further arguments were necessary, with reference to the *status* of the late King, and of his grandfather *Shah Alum*, the despatch of Lord *Wellesley* to the Secret Committee of the Court of Directors of the *East India Company* of the 13th of July, 1804 (4 *Wellesley* Despatches, p. 132) might be referred to.

The *status* of the King of *Delhi* and that of the Begum *Sumroo*

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were very different. The latter was held not to be a sovereign princess, but a mere jaidadar under *Scindia;* and this fact distinguishes the present case from that of *Forester and others* v. *The Secretary of State for India* (1), in which the judgment of the Judicial Committee was pronounced on the 13th of May last. In that case it was also held that the act of Government was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign State; but that it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. It was said "the possession was taken under colour of a legal title, that title being the undoubted right of the Sovereign Power to resume and retain or assess to the public revenue all lands within its territories upon the determination of the tenure under which they may have been exceptionally held free. If by means of the continuance of the tenure or for other cause a right be claimed in derogation of this title of the Government, that claim, like any arising between the Government and its subjects, would, *primâ facie*, be cognisable by the Municipal Courts of *India*."

The seizure of the Royal Targool villages, for the reasons above given, does not fall within the ruling of *Forester and others* v. *The Secretary of State for India* (1), but is governed by the principles laid down in *The Secretary of State in Council* v. *Kamachee Boye Sahiba* (2); *The East India Company* v. *Syed Ally* (3); and in other cases in which the same principle is affirmed. But it is contended that these considerations do not necessarily determine the right of the mortgagees, who are British subjects, to what they claim. It is argued that the British authorities had given *Shah Alum* estates in British territory to be dealt with at his free will and pleasure, so that the charges *bonâ fide* created by him while in possession *de facto* and *de jure*, as owner, survived his deposition. But their Lordships are clearly of opinion that no such ownership or power of disposition was conferred upon *Shah Alum* or his successors. The territories were assigned to him for the support of his royal dignity, and the due maintenance of himself and family in their high position. If he had died or abdicated his

(1) *Ante*, p. 10. (2) 7 Moore's Ind. Ap. Ca. 476, &c.
(3) 7 Moore's Ind. Ap. Ca. 555.

successor would have taken the property in the same way, free from all charges. It was a tenure (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself.

Their Lordships are clearly of opinion that the Circular Order, No. 112, does not amount to a law. It was not enacted as a law, nor did it purport to be a law; and it does not fall within the meaning of 24 & 25 Vict. c. 67.

The Circular was merely a Circular from the Judicial Commissioner, forwarding, for the information and guidance of the Commissioners of the several divisions of the *Punjaub* a copy of correspondence between the Government of the *Punjaub* and the Government of *India*, on the question of the liability of Government for the debts of rebels whose estates had been confiscated for rebellion.

It is clear from the whole tenor of the correspondence, which originated out of certain questions referred by the Judicial Commissioner of the *Punjaub* for the decision of the Lieutenant-Governor of the Province, that the Government did not intend to lay down any rule of law for the breach of which redress might by obtained in a Court of Law, or to use the words of Lord *Kingsdown*, in *The East India Company* v. *Syed Ally* (1) "to submit the conduct of its officers, in the execution of a political measure, to the judgment of a legal tribunal." They intended only to declare the course which a sense of justice and equity would induce them, in their discretion and as an act of favour, to adopt. The correspondence in Circular No. 112 did not apply to the Appellants' case. That was treated of in the Circular of the 12th of January, 1861, in continuation of Circular No. 112. In that Circular of the 12th of January, 1861, the correspondence on the subject of the Appellants' claim was forwarded, and amongst other letters one from the officiating secretary to the Government of *India* to the secretary of the Government of the *Punjaub*, dated the 28th of December, 1860. In that letter, paragraph 6, it is written:

"6. The general rule is that rent-free estates, secured by grants from Government, are not liable for the debts of deceased grantees.

(1) 7 Moore's Ind. Ap. Ca. 555.

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The exception is in the case of such estates which have been confiscated, and this exception is based on the consideration that 'the interests of justice require the protection of creditors from the effects of a political catastrophe which they could not have foreseen.' But creditors who, like *Saligram* and *Devee Singh*, joined the rebellion voluntarily, accepted such security for their claims as the rebel cause might offer. They not only foresaw, but assisted to produce the catastrophe, and therefore the interests of justice do not require that they should be protected from its effects. *They may have all that they are entitled to by the letter of the law; but the Governor-General would deny them that which can be claimed only as a favour, for it is in the essence of a concession by favour that it should be withheld where favour is not due.*

"7. The Governor-General is of opinion that neither *Saligram* and *Devee Singh's* claim, nor that of any other creditor of the exking, who has been convicted of rebellion, to the liquidation of their debts from the revenues of the Crown lands should be admitted."

Even if the prior Circular, on which the Appellants rely, could on any fair principles of legal construction be held to be a legislative recognition of the rights of the creditors of the deposed sovereign to be paid out of the revenues of the deposing Government (the only way in which it could avail the Plaintiffs), the last Circular is an act of like character, of equal validity, and equally binding on the Courts of Law.

Their Lordships think it desirable to make a few observations on the case of *Lalla Narain Doss* v. *The Estate of the late King of Delhi* (1), in which this Board came to a conclusion in favour of a claimant under the Circulars in question. The title of the cause itself, in which the estate was named as a party, shews how it came to be a matter of judicial cognizance. The Plaintiff there was admitted to claim against the estate. But he was put to prove that he was such a creditor as he alleged himself to be,—that he was one of the creditors intended to be protected by the Circulars. That issue having been raised, and having been, by the act of the Government itself, put in a train of judicial investigation by the legal tribunals, had to be determined in the same

(1) 11 Moore's Ind. Ap. Ca. 277.

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manner and on the same principles as any other issue legally raised in any ordinary litigation, and the determination was, that the Plaintiff had established his claims under the Circular, as alleged, and that the objections to it had failed. That case has no application to the present, in which the Appellants were peremptorily excluded from the benefit of the Circular.

Their Lordships are of opinion that the judgments from which this appeal was preferred were correct, and they will humbly report to Her Majesty that, in their opinion, those judgments ought to be affirmed, and this appeal dismissed with costs.

Agent for the Appellants: *W. H. Oehme.*
Agents for the Respondents: *Lawford & Waterhouse.*

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GOPEE LALL . . . . . PLAINTIFF;

AND

MUSSAMAT SREE CHUNDRAOLEE BUHOOJEE . . . . . } DEFENDANT.

ON APPEAL FROM THE HIGH COURT OF THE NORTH-WEST PROVINCES, AGRA.

Hindu Law—Second Adoption—Practice.

It is settled law that a man cannot, either by himself or by his widow acting under authority delegated by him, while he has an adopted son living, adopt another son.

Rungama v. *Atchama* (1) approved.

A Plaintiff who has alleged and failed to prove a title as heir to an invalidly adopted son, cannot in appeal set up a totally new case as heir to the alleged adoptive father.

APPEAL from a decree of the High Court at *Agra* (April 11, 1868) reversing a decree of the Principal Sudder Ameen of *Agra* (December 24, 1867).

The facts of the case are set out in the judgment of their Lordships.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

(1) 4 Moore's Ind. Ap. Ca. 1.

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GOPEE LALL v. MUSSAMAT SREE CHUNDRAOLEE BUHOOJEE.

Forsyth, Q.C., and *Pontifex*, for the Appellant.

Leith, *Cowie*, and *Campbell*, for the Respondent.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

This was a suit brought to recover possession of a temple and certain jewels and valuables held therewith. The Plaintiff claimed as heir of one *Luchmunjee*. He endeavoured to prove his heirship in this way. He asserted that his grandfather *Damodurjee* had two wives, *Luchmee* and *Charmuttee*: that shortly before his death he gave a power to his wives to adopt two sons; that after his death his first widow *Luchmee* adopted *Gobind Jee*, the father of the Plaintiff; that some four years afterwards the second widow, *Charmuttee*, adopted *Luchmun Jee*, through whom the Plaintiff claims. The Plaintiff asserts that on the death of *Luchmun Jee*, who according to his case was his uncle, he became the heir to *Luchmun Jee*, who was in possession of the property. He admits that the Defendant, the widow of *Luchmun Jee*, had a life interest in the property, but he alleges that she had forfeited that life interest by committing waste.

The Principal Sudder Ameen found in effect that the Plaintiff had proved the whole of his case. The High Court reversed the decision of the Principal Sudder Ameen; they expressed themselves by no means satisfied that the Defendant had forfeited the property by committing waste; but they deemed it unnecessary to decide this question, inasmuch as they came to the conclusion that the Plaintiff had failed to prove his heirship to *Luchmun Jee*. They were by no means satisfied that the Plaintiff proved all the facts on which he relied; but they came to the conclusion that, assuming all those facts to be proved, as the Plaintiff alleged them, still in point of law his case failed for this reason, that according to Hindu law there cannot be two valid successive adoptions, and that the first widow having adopted a son, *Gobind Jee*, the second widow could not, while *Gobind Jee* was alive, make another valid adoption.

The question of successive adoption was argued very elaborately and very carefully considered in the case of *Rungama* v. *Atchama*

and others, reported in the 4th volume of *Moore's* Privy Council Appeals, page 1; and since the decision of that case, whatever doubts may have been entertained on the question before, it must be considered as settled law that a man cannot, while he has an adopted son living, adopt another son. And in their Lordships' opinion it follows on principle that a man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his lifetime; and that inasmuch as he, *Damodurjee*, could not, one adopted son being living, adopt another, his second widow *Charmuttee* could not by virtue of any authority delegated from him adopt a son while an adopted son was still living.

Their Lordships therefore concur with the judgment of the High Court, which amounts to this, that, assuming all the Plaintiffs' facts, as he alleges them in his own favour, still that in point of law the second adoption was invalid, and that consequently there was no relationship between him and the second adopted son, *Luchmunjee*, under whom he claims.

That being so, their Lordships do not think it necessary to give an opinion as to whether the facts on which the Plaintiff relies have been substantiated or not. Assuming them to have been substantiated his case in point of law fails.

It has been argued on the part of the Appellant that the Defendants in this case are estopped from setting up the true facts of the case or even asserting the law in their favour, inasmuch as they have represented in former suits and in various ways, by letters and by their actions, that *Luchmunjee* was the adopted son of *Damodurjee*, adopted by *Damodurjee's* widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of *Luchmunjee* or the Defendant on any matter of fact. They are alleged to have represented that *Luchmunjee* was adopted. The Plaintiff's case is that *Luchmunjee* was in fact adopted. So far as the fact is concerned there is no misrepresentation. It comes to no more than this, that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties.

It may further be observed that if *Luchmunjee's* statement is to

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be taken, it must be taken as a whole; and what he asserts is that he was validly adopted. But if he was validly adopted it follows that the Plaintiff was invalidly adopted; and therefore in this view of the case it appears to their Lordships that no reliance can be placed upon this question of estoppel.

It has, indeed, been further argued that even putting it not so high as estoppel, still the Plaintiff has been misled, by various representations made by the Defendant, into framing his suit as it is now framed. If that were so it would not empower their Lordships to depart from the rule which has always prevailed, that a man must recover according to his allegations and his proofs. It would not enable their Lordships to allow (as the Appellant asks them to allow) an entirely new case to be now brought forward before them, which is not even set up or hinted at in the plaint.

The new case suggested appears to be that, assuming an invalid adoption of *Luchmunjee*, and treating *Luchmunjee* as a mere trespasser, still the Plaintiff could recover by proof of his title from *Damodurjee*. Whether he has such a case or not their Lordships do not think it necessary to decide, but they feel themselves bound to say that that case cannot be gone into, inasmuch as it has not been set up in the plaint. Their Lordships do not desire to construe plaints with any extreme strictness or technicality, but it would manifestly be extremely inconvenient, and certainly contrary to their practice, to allow a case to be raised here which is entirely different from the one which has been previously insisted upon.

For these reasons their Lordships are of opinion that the decree of the High Court is right and ought to be affirmed. Their Lordships understand the High Court simply to have ruled that the Plaintiffs had failed to prove the title on which they sued, that the Principal Sudder Ameen's decree ought therefore to be reversed and the suit dismissed, with costs. But inasmuch as the formal decree, which simply orders that the appeal be decreed, with costs, and the decision of the Principal Sudder Ameen reversed, may hereafter lead to some doubt as to what was really decided by the High Court, their Lordships think that the formal decree should be varied by ordering that the decision of the Principal Sudder

Ameen be reversed and the suit dismissed, with costs, in both Courts; and their Lordships will humbly advise Her Majesty to this effect. The Appellants must pay the costs of this appeal.

Agents for Appellant: *Tucker, New, & Langdale.*
Agent for Respondent: *T. L. Wilson.*

MUSSUMAT MULLEEKA . . . . . DEFENDANT;

AND

MUSSUMAT JUMEELA AND OTHERS . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Mahomedan Law—Prompt Dower—Demand of Payment—Cause of Action—Limitation.

Prompt dower is exigible immediately, but limitation does not begin to run until demand has been made, or until the marriage is dissolved by death or otherwise.

APPEAL from two decrees of the High Court (May 31, 1864), and a further decree on remand (Jan. 10, 1866).

The facts of the case are stated in the judgment of their Lordships.

Doyne, for the Appellant.

Leith, and *C. W. Arathoon*, for the Respondent.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The Appellant was one of the Defendants in the Court below. The suit was brought to recover a very large sum of money—viz., Rs.16.25,000, upwards of £160,000, as the balance due on account of dain mohur, or dower, alleged to have been settled upon the Plaintiff *Jumeela* by her late husband *Syud Mahomed*.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

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The suit was instituted by *Jumeela* and two other persons, viz., Mr. *H. O. King*, a mooktear, and *Mussumut Summunt Koonwarree*, Mr. *H. O. King* being a purchaser for the sum of Rs.5000 of one-fourth part of the amount alleged to be due to the Plaintiff *Jumeela*, and also of one-fourth of her share in the landed estate of her deceased husband, and the Plaintiff, *Mussumut Summunt Koonwarree*, being also a purchaser of another fourth part of *Jumeela's* dain mohur, and of her share of her deceased husband's estate for a like sum of Rs.5000.

The dower was described in the plaint as "Dain Mohur, Moûjjul," or dower payable at a future period on divorce or death of the husband.

The Defendant pleaded limitation, upon the ground that the Plaintiff had been divorced by her husband more than twelve years before the commencement of the suit.

Three issues were laid down:—

1. Whether *Syud Mahomed* actually divorced the Plaintiff, *Mussumat Jumeela*, his wife.

2. How much of the dain mohur was payable immediately, and how much deferred.

3. Whether, with reference to the determination of the first and second issues, the suit was barred by limitation.

With reference to the last issue, it should be stated that the suit was commenced on the 3rd of September, 1860, and that the period of limitation was that fixed by Regulation 3 of 1793, sect. 14, viz., twelve years. The marriage took place more than twelve years before the commencement of the suit. *Syud Mahomed* died on the 21st of February, 1854—more than six years, and less than twelve years before the commencement of the suit.

The case was tried by the Principal Sudder Ameen of *Bhagulpore* upon the second issue in the first instance. He found that the dain mohur was prompt, and with advertence to that finding he held that the twelve years ought to be calculated from the date of the marriage, and that consequently the suit was barred by lapse of time. He did not consider it necessary to try the first issue, whether the Plaintiff had been divorced or not, but dismissed the suit with costs, on the ground of limitation.

The case was appealed to the High Court for a 12-anna share

of the sum claimed on account of dain mohur, exclusive of the one-fourth share of Mr. *H. O. King*, who did not join in the appeal. The Petitioners in the appeal were *Jumeela* and *Summunt Koonwarree*, and also one *Lokenath Misser*, who, pending the suit, viz., on the 31st of March, 1862, purchased from *Jumeela*, for the sum of Rs.400, a 2-anna share of her dain mohur.

The appeal was heard by a Division Court. They found that the divorce was not proved, and held that the suit was not barred by limitation. They reversed the decision of the Principal Sudder Ameen, and remanded the case to him to try what was the amount of the dower. That was on the 31st of May, 1864.

The Defendants, on the 23rd of June, 1864, appealed to Her Majesty in Council against that decision.

The case having gone back upon remand under the decision of the High Court, the then Principal Sudder Ameen, a Mahomedan, proceeded to try what was the amount of the dower. Many witnesses were examined on both sides, and he found that the dain mohur was settled at one lac and eighty thousand, one moiety rupees, and the other gold mohurs, and he gave a decree for the Plaintiffs for the amount claimed, viz., Rs.16.25,000, with costs and interest. He came to that conclusion not only upon the evidence of witnesses who spoke to what actually took place, but upon the evidence of other witnesses, to whom he gave credit, that the custom prevailing in the Plaintiff's family and also in most of the other respectable families in *Bhagulpore*, was in accordance with the amount which the other witnesses proved to have been actually settled in their presence.

On the 13th of February, 1865, an appeal was preferred by the Defendants to the High Court against that decision. The case was heard before a Division Bench of the High Court, and the appeal was dismissed, with costs.

The Defendant *Mussumat Mulleeka* alone, on the 5th of July, 1866, appealed to Her Majesty in Council against the last-mentioned decree of the High Court, the other Defendant having compromised the claim against him.

We have therefore, under the two appeals before us, to consider whether the judgment of the High Court overruling the plea of limitation, and remanding the case, and the decision as to amount

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of dower, are correct or not. Their Lordships are of opinion that a divorce was not proved. In this respect they concur in the finding of the High Court upon a question of fact. They intimated that opinion in the course of the argument.

It is now to be considered whether the suit was barred by limitation. In the first place we will consider whether it was barred if the dower was prompt.

The Principal Sudder Ameen on the first trial held that as the dower was settled without any specification as to the time at which it was to be payable, it must, according to the Mahomedan law, be considered to be dain mohur moûjjul, to be paid, to use his own words, "on demand or immediately on demand by the wife." The High Court, upon the first appeal, considered the Mahomedan law to be precise, that if nothing is said at the time, the dower is to be considered exigible; but they held, upon the authority of *Ameeroonissa* v. *Mooradoonissa* (1), that although the dower was exigible, the Plaintiff *Jumeela* was not bound to sue for it during the life of her husband.

Their Lordships are of opinion that the Principal Sudder Ameen, who first tried the case, and who considered that the dower was payable on demand, was not correct in holding that the cause of action accrued to the wife before dissolution of the marriage without demand. There are no doubt conflicting decisions as to the period at which a cause of action accrues to a wife in respect of prompt dower. Prompt dower is said to be exigible immediately. *Macnaghten*, in his Principles of Mahomedan Law, p. 59, says: "Where it has not been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand." The word "exigible" implies that it may, not that it must, be exacted, and therefore it would seem that a cause of action in respect of it does not accrue so long as the marriage exists, until the wife does something to shew that she requires it to be paid. According to the Mahomedan law a woman may refuse herself to her husband as a means of obtaining so much of her dower as is prompt: *Baillie*, Dig. of Mahomedan Law, p. 125. That is a mode of exacting it. But she is not obliged to adopt it. It is optional with her either to insist upon

(1) 6 Moore's Ind. Ap. Ca. 211.

the payment of her prompt dower during her husband's lifetime, or to wait until the dissolution of the marriage.

In *Meer Nujiboolah* v. *Mussumat Doordana Khatoon* (1) it was held that the right to prompt dower was barred by limitation in consequence of the period which had elapsed since the date of the settlement, although at the time of the commencement of the suit twelve years had not elapsed since the husband's death. That decision was followed in *Noorunissa Begum* v. *Nawab Syud Allee Khan* (2). In the case of *Nawab Jung Bahadoor Khan* v. *Mussamut Uzeez Begum* (3) the Court pointed out the distinction between a contract to pay on a stipulated date and a contract to pay on demand, and said that, in the former case, should the obligor fail to pay on the stipulated day, a cause of action would then accrue for the recovery of the sum due; but that in the case of an obligation to pay on demand (which they considered an obligation to pay exigible dower to be) there was no infraction of the obligation, and, consequently, no legal cause of action before demand. From the case of *Ameeroonissa* v. *Mooradoonissa* (4) it would seem that the Lords of the Judicial Committee were of opinion that limitation in respect of prompt dower did not run from the time of the marriage, but from the death of the husband. In that case there was a settlement by which the husband agreed to pay dower when demanded by his wife. The wife was not suing for her dower, but was in possession of her deceased husband's property, and set up her right of dower in answer to the husband's heir, who sued to recover possession of the estate. In that case the Lord Justice *Knight Bruce* expressed the opinion of the Judicial Committee that a wife was not obliged to sue her husband immediately or in his lifetime; and that limitation did not apply as a bar to her claim for dower.

If the principle of that decision be followed in the present case, the Plaintiff is not barred by limitation.

In the case of *Simpson* v. *Routh* (5), which was referred to in the last-mentioned case, Lord *Tenterden* said: "In this, as in other

(1) 1 Select Rep. 103.
(2) 7 Select Rep. 40.
(3) Decis. N. W. P. for 1845, p. 180.
(4) 6 Moore's Ind. Ap. Ca. 229.
(5) 2 B. & C. 682.

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cases where a demand is necessary to give a right of action, the commencement of the action is not of itself a demand."

In *Macnaghten's* Precedents of Mahomedan Law, p. 275, it is said: "The dower becomes due on the consummation of the marriage, or the death of either of the parties, or on divorce. Should the wife not claim the payment of it during the lifetime of her husband, it must be paid to her out of the property left by him on his decease."

Their Lordships are of opinion that the case of *Nawab Jung Bahadoor Khan* v. *Mussumat Uzeez Begum*, above cited, was rightly decided, and that, in respect of prompt dower payable under the Mahomedan law, limitation does not begin to run before the dower is demanded, or the marriage is dissolved by death or otherwise.

In the present case, as a divorce was not proved, it is unnecessary to consider whether, even in the case of a divorce, a cause of action accrues in respect of deferred dower before the repudiation has become irrevocable, or the dower has been demanded.

Their Lordships having determined that there was no divorce, and that the suit was not barred by limitation if the dower was prompt, it becomes unnecessary to determine whether it was prompt or deferred; for the suit having been commenced within twelve years from the time of the death of *Syud Mahomed*, it was clearly not barred if the dower was deferred.

The question as to the amount of dower was one of fact, as to which their Lordships see no reason to interfere with the decision of the Principal Sudder Ameen, which was affirmed on appeal by the High Court. Their Lordships concur in the remark of the High Court: "It may be true that the sum claimed and deposed to as agreed upon and customary is a very large sum; but the Mahomedan law books, the decided cases, and the experience of the country, shew that it is a fact that sums so apparently beyond the means of the parties are fixed as dower amongst Mahomedans from the highest to the lowest."

There is nothing in the Mahomedan law to limit the amount fixable for dower. See 1 *Macnaghten's* Select Cases, p. 275, and *Id.* p. 48, in which the amount fixed was 300,000 gold mohurs. See also the same vol. p. 266. The above cases, it should be remarked, were decided upon the authority of futwas obtained

from the Mahomedan law officers. In *Macnaghten's* Precedents of Mahomedan Law, p. 131, there is the opinion of Mahomedan law officers that a dower exceeding 150,000 gold mohurs, which absorbed the whole estate of the husband, took precedence of claims by inheritance.

No defence was set up in the Court of original jurisdiction, upon the ground that the amount fixed was a mere sham, and that neither of the parties intended that it was to be acted upon, and it is not for a Court of Appeal to suggest or give effect to such a defence when it was never raised in the Court of original jurisdiction, which, if the question had been there raised, might have laid down a distinct issue, and taken evidence upon the subject. In *Macnaghten's* Principles of Mahomedan Law, case 35, p. 288, a very large amount of dower was upheld on a question put to ascertain whether the deed of dower was a mere device to prevent divorce.

The judgment of the Principal Sudder Ameen upon the trial after the remand was, "that a decree should pass in favour of all the Plaintiffs, viz., *Mussamat Jumeela, Summunt Koonwarree,* and Mr. *King,* to this effect, that they the Plaintiffs do recover *the amount in suit* with interest and costs from the Defendants in possession of the property left by *Syud Mohummud, in proportion* to their appropriations, as well as from the property left by the said deceased. No decree appears to have been drawn up upon that judgment, as it ought to have been. The High Court dismissed the appeal from that decision with costs. The judgment accordingly stands.

It appears to their Lordships that the judgment was not correct. Mr. *King* not having appealed from the first decision, viz., that of the Principal Sudder Ameen of the 8th of March, 1862, was not entitled to the benefit of the reversal of that judgment, and the judgment under the remand ought not to have been in his favour, but ought to have been limited to the 12-anna share, to which alone the appeal related. Further, their Lordships are of opinion that the decree is erroneous in awarding the demand against the Defendants in proportion to their appropriations, and in rendering them personally liable to that extent in addition to the charge

(1) *Mussamut Jariatoolbutool* v. *Mussumut Hosseinee Begum,* 11 Moore's Ind. Ap. Ca. 207.

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upon the assets. The Defendants were not liable except as representatives of the deceased. As representatives they were liable for the whole debt to the extent of the assets received and not duly administered by them respectively. It is not because an executor or heir has only three-fourths of the assets that he is liable only to three-fourths of the debt. He is liable to pay the whole debt so far as the assets in his hands will go.

Whatever the amount of assets, the proper form of decree against the two Defendants, sued jointly as representatives, is that the Plaintiff do recover the whole amount against the Defendants as representatives of the deceased, to be paid out of the property of the deceased. Each of the Defendants would then be liable for the whole debt to the extent of the assets received by him, and the decree would be executed by the attachment and sale of as much as necessary of the property of the deceased in the hands of both or either of the Defendants; and if no such property could be found, or the Defendants should fail to satisfy the Court that they had duly applied such property of the deceased as should be proved to have come into their several possessions, the decree might be executed against the Defendants respectively to the extent of the property not duly applied by them, in the same manner as if the decree had been obtained against them personally, or, in other words, by the attachment and sale of their own private properties (Act VIII. of 1859, s. 203). If, however, the decree were against one of the Defendants for three-fourths of the debt and against the other Defendant for one-fourth, and the Defendant against whom the decree for one-fourth was given should prove, under the execution, that he had duly applied the whole of the one-fourth of the assets which had come to his hands in payment of other just debts due from the deceased, the decree holders could not levy more than three-fourths of the debt upon the other Defendant, notwithstanding the assets in his hands might be sufficient to pay the whole debt, and thus they would be deprived of one-fourth of their demand, notwithstanding the rule of Mahomedan law that all the assets must be applied in payment of debts in preference to claims by inheritance.

If matters had remained as they were when the Principal Sudder Ameen gave judgment upon the trial after the remand, the decree

might be set right by declaring that the Plaintiffs, *Jumeela* and *Summunt Koonwarree*, do recover three-fourths of the amount of dower from the Defendants as representatives of the deceased, to be paid out of the assets of the deceased. But it appears that one of the Defendants, viz., *Syud Mohamed Hossein*, after the decree of the Principal Sudder Ameen under the remand and before the decree of the High Court upon the appeal against that decree compromised the claim against him.

The solenamah or deed of compromise was made between the Plaintiff *Jumeela* and *Kassim Ally Khan*, described as purchaser of the share of *Beebee Jumeela*, the Plaintiff *Summunt Koonwarree*, *Lokenath Misser*, and the Defendant *Syud Mahomed Hossein*. After reciting that certain suits were depending between them, each of the parties renounced and relinquished every sort of claim, and declared that there remained no claim one against the other. By paragraph 1 it was declared that out of the 16 annas of the property of the late *Syud Mahomed*, 12 annas had come into the possession of the Defendant *Syud Mohummud Hossein*, and of purchasers from him, of which 5 annas and 9 pie came to the Defendant *Mahomed Hossein* as his share, and the remainder, 6 annas and 3 pie, came to the Plaintiff *Mussumut Jumeela* and others as their share (meaning that, by the terms of the compromise, they were to have a 6-anna 3-pie share). By paragraph 2 it was declared that out of the 6-anna share (meaning, no doubt, the 6-anna 3-pie share), the Plaintiff *Jumeela*, and at the then present moment *Kassim Ally Khan*, who was stated to be the purchaser of her share, had accepted 2 annas; the Plaintiff *Mussumut Summunt Koonwarree*, in lieu of the entire properties (that is, the shares of *Jumeela's* dower purchased by her), accepted a 3-anna and 6-pie share; and *Lokenath Misser*, in lieu of his purchase, accepted a 9-pie share. These shares constituted the whole of the 6-anna 3-pie share of the estate of the deceased, which was given by the Defendant *Mahomed Hossein* in satisfaction of the claim against him.

By the 9th paragraph it was declared that all differences existing between the parties to the compromise having been cleared up, thereafter no manner of claim whatever remained to be instituted one against another either regarding the payment of dain

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mohur or the expenses of the suits therein mentioned, or for the recovery of wassilat (mesne profits) and each of the declarants renounced and relinquished the total expenses of all suits from the beginning up to the then present moment.

By paragraph 10 the parties agreed to file petitions of agreement in the cases of appeal to *England* and to the High Court, and the Zillah Courts and *Mahomed Hossein* relinquished the security bond in the case in appeal to the Privy Council.

Paragraph 11 was as follows:—

"Since the conditions of this salehnamah are in accordance with the afore-mentioned detail regarding the 12-annas share, and the 4-annas share of the property left by *Syud Mohumud* has come into the possession of *Mussamut Mulleka*, the same has no concern with *Hajee Mahomed Hossein* and others. It has therefore been settled between *Mussamut Jumeela*, *Kassim Ally Khan*, *Summunth Kooeree*, and *Lokenath Misser*, that the whole, or any portion of the 4-annas which may be acquired by the compromise, or in execution of the decree for the "dain mohur," or by means of the institution of a suit for *Mussamut Mulleka*, shall be partitioned into sixteen shares, out of which *Mussamut Summunth Kooeree* shall take ten shares, and five shares *Mussamut Jumeela* and *Kassim Ally Khan*, and one share *Lokenath Misser*."

In pursuance of the agreement in paragraph 10, the solenamah was sent up to the High Court and was recorded and forms part of the record before us.

The suit ought, according to the provisions of sect. 98, Act VIII. of 1859, to have been disposed of in accordance with the terms of the compromise. The decree of the High Court, after referring in express terms to the compromise, dismissed the appeal, and thereby in substance upheld the decision of the Principal Sudder Ameen of the 28th of September, 1864. It was certainly not in accordance with the compromise, for the decree of the Principal Sudder Ameen ordered the Defendant *Mahomed Hossein* to pay a proportion of the debt and costs; and the decree of the High Court ordered him to pay the costs of the appeal, though the Plaintiffs had expressly renounced all costs.

It is important to remark that the 6-anna 3-pie share of the estate which was given by the Defendant *Mahomed Hossein* in

satisfaction of the claim against him, consisted of immoveable estate. Their Lordships know nothing as regards the value of the whole of the estate or of the 6-anna and 3-pie share accepted by the Plaintiffs in satisfaction of their claim against the last-named Defendant.

It appears to their Lordships that the effect of the compromise was to release the Defendant *Mahomed Hossein* and the 12-anna share, or three-fourths of the assets which came to his hands, and consequently to release the other heirs and the remaining one-fourth of the assets from that portion of the debt which, as between the several heirs, ought to be borne by the three-fourths of the assets released, or, in other words, from three-fourths of the amount claimed. That is the construction which the High Court, by their decree, appear to have put upon the compromise. If the whole debt should be decreed to be levied out of the remaining one-fourth of the assets, the Plaintiffs having received a 6-anna 3-pie share of the whole estate, might still levy the whole debt, and thus obtain more than they are entitled to; and if the debt should be levied out of the remaining one-fourth of the assets, the Defendant *Mahomed Hossein* would, as between him and the other heirs, be liable to contribute three-fourths of the amount so levied, notwithstanding the compromise by which he gave a 6-anna 3-pie share of the estate in discharge of the liability of the 12-anna share of the assets which came into his possession, and to enable him to retain, as against the Plaintiffs, the other 5-anna 9-pie share of the assets. Their Lordships, therefore, think that, in consequence of the compromise, the remaining one-fourth of the assets is liable for only one-fourth of the debt.

The shares of heirs cannot be ascertained until all debts have been satisfied. It is only the balance after paying all debts that, according to the Mahomedan law, is divisible amongst them. A compromise operates for the benefit of all those amongst whom the estate is divisible, and the balance is divisible amongst them (see *Baillie* on the Mahomedan Law of Inheritance, p. 108). If the compromise made by *Mahomed Hossein* by giving up to the Plaintiff a 6-anna 3-pie share of the estate operated for his benefit alone, and to release the three-quarter share of the assets which he took by inheritance, the result would be that he might retain a 5-anna

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3-pie share of the estate out of the 12-anna share which came to his hands, whilst the other fourth of the estate in the hands of *Mulleka* might be seized and sold for payment of the remainder of the debt, and thus be wholly absorbed. By these means *Mahomed Hossein*, as one of the heirs, would obtain a 5-anna 9-pie share of the estate whilst the other heirs would get nothing, which would be contrary to the principles of the Mahomedan law of inheritance.

It may be, and probably is, the fact that even one-fourth of the debt will absorb the whole of the remaining one-fourth of the assets, and, if that be the case, the heirs of *Mahomed Hossein* may be called upon by the other heirs for contribution out of the 5-anna 9-pie share, which he retained under the compromise. If such should be the effect of the decree against *Mulleka* for one-fourth of the debt, it will be because the compromise did not intend to release more than three-fourths of the assets. This is clear from the 11th paragraph of the compromise.

The Defendant *Mahomed Hossein* jointly with Defendant *Mulleka* appealed to the High Court, but having compromised the claim against him he has not joined in the appeal to Her Majesty in Council. The consequence is that the decree of the High Court will stand against him, and he must avail himself of the compromise in such manner as he may be advised, should the Plaintiffs endeavour to execute the decree against him. If he had appealed he would have been entitled to have the suit disposed of in accordance with the compromise according to the provisions of sect. 98 of Act VIII. of 1859. In that case the decree must have been modified as against the Defendant *Mulleka*, and she cannot be deprived of the benefit of the compromise in consequence of *Mahomed Hossein's* not having appealed.

The decree of the Principal Sudder Ameen, of the 28th of September, 1864, upon the trial after the remand, and the decree of the High Court, of the 10th of January, 1866, by which that decree was upheld, ought to be reversed. Mr. *King's* share of the amount claimed has already been disposed of in consequence of his not having appealed against the first decision of the Principal Sudder Ameen of the 8th of March, 1862. Their Lordships are of opinion that the Plaintiffs, *Jumeela* and *Summunt Koonwarree*,

are not entitled to recover from the Defendant *Mulleka* more than three-fourths of the one-fourth of the demand which has not been satisfied by the compromise, or, in other words, three-sixteenths of the whole amount claimed, but that they are entitled to a decree against her as representative of the said *Syud Mahomed*, deceased, for three-sixteenths of the amount sued for, and three-sixteenths of the costs incurred in the Lower Courts prior to the appeal to the High Court of the 13th of February, 1865, to be paid out of the property of the said *Syud Mahomed*, deceased, other than the 12-anna share, or three-fourths thereof, to which the said compromise related, and that the decree of the High Court of the 31st of May, 1864, ought to be affirmed, but that, in consequence of the compromise, it should be modified as to the costs.

Considering also the mode in which so large an amount of dower was settled by the deceased without any writing, and the uncertainty which existed as to whether payment of it would amount to a due administration of assets, we think that the Defendant *Mulleka* was justified in resisting the suit and taking the opinion of the Court, and that she ought to be at liberty to retain her costs incurred in the several proceedings in this suit, and in the appeals to Her Majesty in Council, out of any assets of the said *Syud Mahomed* in her hands after satisfaction of the sums awarded against her in this suit; and that such costs take priority of all claims by inheritance to any portion of such assets.

Upon the whole their Lordships will humbly advise Her Majesty that the decree of the High Court of the 31st of May, 1864, be affirmed, except so far as the Defendant *Mulleka* is thereby ordered to pay costs and interest thereon, and that the Plaintiffs *Jumeela* and *Summunt Koonwarree* do recover against the Defendant *Mulleka*, as representative of the late *Syud Mahomed*, deceased, three-sixteenths of the costs and interest awarded by the said last-mentioned decree, to be paid out of the assets of the late said *Syud Mahomed*, deceased, other than that portion thereof to which the said compromise relates; that the judgment of the Principal Sudder Ameen, of the 28th of September, 1864, and the judgment and decree of the High Court, of the 10th of January, 1866, so far as they relate to the Defendant *Mulleka*, be reversed, with costs of the appeal to the High Court

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of the 13th of February, 1865, and that it be decreed that the Plaintiffs *Jumeela* and *Summunt Koonwarree* do recover against the Defendant *Mulleka*, as representative of the late *Syud Mahomed*, deceased, three-sixteenths of the whole amount claimed in the suit, and three-sixteenths of the costs incurred by the Plaintiffs in the Lower Court prior to the appeal to the High Court of the 13th of February, 1865, the said portions of the amount claimed, and of the said costs, to be paid out of the property of the late *Syud Mahomed*, deceased, other than that portion thereof to which the said compromise relates, and that such decree be without prejudice to the rights, if any, which the Defendant *Mulleka*, or any of the heirs of the late *Syud Mahomed*, may have against the said Defendant *Mahomed Hossein* in consequence of the execution or satisfaction of the said decree, and that the Defendant *Mulleka* be at liberty to retain her costs of all the proceedings in this suit, and also of the appeals to Her Majesty in Council, out of any assets of the said *Syud Mahomed*, deceased, in her hands, after satisfaction of the sums awarded against her in this suit in preference to all claims by inheritance to such assets.

And their Lordships order that each of the Plaintiffs, *Jumeela* and *Summunt Koonwarree*, and the Defendant, *Mulleka*, do bear her own costs of the above-mentioned appeals to Her Majesty in Council.

Agents for Appellant: *Hendersons.*
Agent for Respondents: *J. L. Wilson.*

SREE NARAIN MITTER . . . . . DEFENDANT;

AND

SREEMUTTY KISHEN SOONDORY DASSEE PLAINTIFF.

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Nov. 5, 6.
1873
Jan. 15.

ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM.

Declaratory Decree—Jurisdiction—Discretion—Act VIII. of 1859, *s.* 15—*Suit to declare Deeds of Gift and Acceptance of a Child in Adoption null and void.*

A declaratory decree cannot be made unless the Plaintiff would be entitled to consequential relief if he asked for it. Even if he would be so entitled, it is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for.

A suit to declare null and void certain deeds of gift and acceptance of a child in Hindu adoption, brought by the donee against the donor, the child not being a party to the suit, *held* not to be maintainable. The deeds were not necessary to a valid adoption, and if the deeds were set aside the adoption if it had taken place might be proved *aliunde*. If the deeds operated merely as an agreement to give and take in adoption, and a breach thereof had occurred, such breach would not render the deeds null and void, or constitute any ground for setting them aside or for declaring them null and void.

APPEAL from a decree of the High Court (March 5, 1869), affirming a decree of the Additional Judge of *Bhagulpore*, which affirmed a decree of the Principal Sudder Ameen, who decreed for the Plaintiff.

The facts are stated in the judgment of their Lordships.

Cowie, and *Bell*, for the Appellant.

Forsyth, Q.C., *Leith*, Q.C., and *Doyne*, for the Respondent.

The main questions argued were as to the right of the Plaintiff to a declaratory decree, and as to the possibility of obtaining any consequential relief. The cancellation, it was contended, of the deeds referred to in the pleadings would be no relief and would not affect the adoption.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

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Upon the first question the following cases were cited: *Jackson* v. *Turnley* (1); *Rooke* v. *Lord Kensington* (2); *Kenaram Chuckerbutty* v. *Dinonath Panda* (3); *Puree Jan Khatoon* v. *Bykunt Chunder Chuckerbutty* (4); *Rani Anandkumari* v. *The Government* (5); *Rajcoomaree Dossee* v. *Nobocoomar Mullick* (6); *Thakoor Deen Tewaree* v. *Nawab Syud Ali Hossein Khan* (7). Upon the latter question the following authorities were cited: *Menu*, Inst. p. 210, sect. 168; *Strange's* Hindu Law, p. 83; *Veerapermal Pillay* v. *Narrain Pillay* (8), *Sreemutty Joymoney Dossee* v. *Sreemutty Sibosoonderee Dossee* (9), and *Perkash Chunder Roy* v. *Dhunmonee Dossee* (10).

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The Appellant was the Defendant and the Respondent the Plaintiff in the suit below. The suit was brought against the Defendant for himself and as guardian of his minor son, called in the plaint *Noggendro Chundro Mittro*, to set aside two deeds dated 30 Joistee, 1271, relating to the adoption of the minor above mentioned.

The Plaintiff was the widow of *Dwarkanath Ghose*, deceased, who died childless. There was no dispute as to the fact of her having received permission from her deceased husband to adopt a son. The Plaintiff in her plaint described the deeds: the one, as a deed by which the Defendant *agreed to give* the said *Noggendro Chundro Mittro*, his minor son, to her for adoption in the Dattaka form; and the other, as a deed by which she *agreed to take* the said child into adoption. The case of the Plaintiff was that, notwithstanding the deeds, the Defendant refused to give the child, and that therefore the form of adoption had not been complied with. The case of the Defendant (see his written statement) was, that the deeds were not mere agreements, but that the deed

(1) 22 L. J. (Ch.) 949.
(2) 25 L. J. (Ch.) 795; 2 K. & J. 756.
(3) 9 Suth. W. R. 325.
(4) Ibid. 381.
(5) 9 Beng. L. R. 16, n.
(6) 1 Boulnois, 137.
(7) 8 Suth. W. R. 341.
(8) Notes of Cases at Madras, 78.
(9) Fulton Rep. 75.
(10) S. D. A. (1853), p. 96.

executed by the Plaintiff was a deed of adoption, and the deed executed by the Defendant a deed by which he actually gave his son in adoption, and that the Plaintiff actually took the child, after the completion of the necessary rites and ceremonies. He stated that the Plaintiff could not recede from the deed of adoption, and that he, the Defendant, could not act contrary thereto. He proceeded—"Now, when the said son, by virtue of his having been adopted, has obtained for himself and his heirs the legal proprietorship of the immoveable and moveable property, and has become the undisputed malik of the estate (referring to the estate of the Plaintiff's deceased husband) for ever, according to the precepts of the Shastras, in that case the Plaintiff has no power to ignore the adopted son's rights; for the giving and taking when completed cannot be revoked, and the Plaintiff has no right to undo that which she has done in obedience to the command of her husband, and the Court cannot interfere in that which the Plaintiff has already done." Further, he contended that, from the terms of the deed executed by the Plaintiff, it was clear that the child had been adopted, and that the necessary rites enjoined by the Shastras had been performed, that the child had ceased to belong to his, the Defendant's, gotra or family, and had been inrolled in the gotra of the Plaintiff, and that the name and family name of the child had been changed from *Mittro* to *Ghose* after the family name of his adoptive father.

The deeds in form are certainly not mere agreements to give and take in adoption.

The deed of gift addressed to the Plaintiff commences—"This is a deed whereby the child is given in adoption." Then, after reciting that the Plaintiff's deceased husband, in consequence of his having no issue, had during his life given permission to the Plaintiff to adopt a male child, and that the Plaintiff had asked the Defendant for a child to compensate for the said defect and to perform the funeral rites of the Plaintiff and her husband, &c., proceeded in the operative part of the deed as follows—

"I have willingly given in adoption my second son, *Noggendro Chundro Mittro*, by my third wife, *Sreemutty Monmohinee*, under the altered name of *Shoshee Nauth Ghose*. The said male child with whom henceforth I have no right at all according to Shastras,

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and who has thus become divested of gotra appertaining to my family, and being equal to the son of your body, has thus become vested with family rights and gotra (lineage) appertaining to your husband's family, under the name of *Shoshee Nauth Ghose*, will discharge or perform all the secular as well as all the religious duties of your husband's family, and will be the owner himself and his heirs for ever of all your husband's property, namely, his zemindary, and all immoveable as well as moveable property, and lands paying rent or rent-free, which stand in his own name or in benamee, and which exist at present, or may hereafter be acquired. For this effect, I have executed the deed whereby the child is given in adoption with the following respectable witnesses, that it will prove efficacious in future."

The deed executed by the Plaintiff addressed to the Defendant, commences:—

"This is a deed of adoption. My husband, the late *Dwarkanath Ghose*, died without issue, leaving me his heiress, on the 30th of June, 1863, corresponding to the 17th Assar of the year 1270. My husband, in consideration of his having no issue in his lifetime, gave me permission to adopt a son for the due performance of the funeral rites of himself and of his ancestors, paternal and maternal, and of myself, and for the due observance and continuation of the religious ceremonies and other ancestral duties, and the other rites and ceremonies peculiar to his family, and fitted to his social position, and for the care of his property, &c., and for the preservation of his name and honour, had expressed his desire that the son so adopted might be the exclusive proprietor of all his property and zemindary, and that none else might have any right or title to his property. At present, in obedience to the aforesaid injunction, and with the unanimous consideration and opinion of myself and my near relations, and members of the family, knowing you to be my sincere and faithful friend, and believing that by means of your respectable family the objects aimed at by myself and my husband will be realized, *I do, with the prescribed rites and ceremonies, adopt as my son, Noggendro Chundro Mittro*, your second son by your third wife, *Sreemutty Monmohinee*. The said *Noggendro Chundro Mittro* has thus become divested of all the rights

and gotra (lineage) appertaining to your family, and has become vested for ever with the rights and gotra of my husband's family under the name of *Shoshee Nauth Ghose*. By virtue of which he having become equal to the son of my body is become the owner himself and his heirs of all my husband's ancestral and self-acquired property which stands in his own name or benamee, namely, zemindary and lands, rent paying, as well as rent free, and gardens, &c., and all the moveable and immoveable property, &c. He will henceforth perform, in the manner described above, the funeral rites, &c., of myself and my husband and of his (my husband's) paternal and maternal ancestors, and shall also perform the religious and family rites and other duties for ever. During his minority I, his mother, shall take care of all his property."

The deeds having been executed and attested were both registered and made over to the Plaintiff's mooktar.

The case was tried before the Principal Sudder Ameen, and amongst others the following issues were laid down: Whether the adoption of the child was complete or not; that is, whether the requirements of the Hindu law were carried out or the gift was not complete and the child not made over. Whether the Defendant refused to make over the child to the Plaintiff or not. Witnesses were examined on both sides and several letters which passed between the Defendant and *Soorjonarayan Singh*, the brother of the Plaintiff, were put in evidence. The Principal Sudder Ameen found that no religious ceremonies were performed; he also tried as a distinct issue, whether there was a formal delivery and acceptance of the child, and found that issue in the negative in favour of the Plaintiff. He said:—

"It is true that the language of the instruments conveys the idea that there was gift and acceptance, as well as completion of ceremonies; but as the Plaintiff denies them *in toto* a judicial determination on these points becomes necessary. It has been already established that the ceremonies were not performed; therefore it remains to be seen whether there was formal gift and acceptance of the boy, as well as due delivery of deeds. If the witnesses of the Plaintiff are to be believed, and I see no reason to doubt their veracity, from their respectable position, neither

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was the gift or acceptance of the boy, nor due delivery of the deeds."

It is not very clear what the Principal Sudder Ameen meant by the latter words, "nor due delivery of the deeds," or by the words used in another part of his judgment, in which he says: "It has been established that the deeds are void for want of delivery." It is clear that he did not use the word "delivery" in the technical sense in which that word is used in *England* when applied to the execution of a deed. He probably meant that the deeds were not interchanged; but that was not necessary or important, if the deeds were deeds of gift and adoption and not mere agreements to give and adopt. The deed executed by the Defendant was delivered to the Plaintiff. The fact that the deed executed by the Plaintiff was retained by her and not handed over to the Defendant would rather tend to shew that at that time it was considered that the child had been adopted. For, if the child was adopted, the Plaintiff became his mother and guardian, and would naturally keep the deeds of gift and adoption on behalf of the child as evidence of the adoption, and as part of the muniments of her child's title to his adoptive father's estates. Be this as it may, however it is clear that the deeds were executed. They are admitted by the Plaintiff in plaint and by the Defendant in his written statement. Indeed, if they were not executed, the suit was useless and must fail.

In concluding his judgment the Principal Sudder Ameen said—

"Summing up, therefore, what has been stated above, it is clear that there has not been a due performance of the ceremonies, and the effect of the deeds was that it was agreed that the child should be made over for adoption, but the Defendant has not done what he was required to do, namely, to hand over the child to the Plaintiff; it is, therefore, ordered that the suit of the Plaintiff be decreed, and she be declared to be not bound by the deeds, dated the 30th Joistee, 1271, which are also declared cancelled and inoperative. The costs of the Plaintiff to be paid by the Defendant."

Upon that judgment the following decree was drawn up:—

"It is ordered that this case be decreed; that the female Plain-

tiff may not be required to observe the document dated the 30th Jeyt, 1271, which has been declared null and void; and that the costs of the female Plaintiff be paid by the Defendant."

The Defendant appealed to the Judge upon the following amongst other grounds:—

"6. That according to Hindu law the Court below was wrong in supposing that more ceremonies than the actual giving and receiving of the child are necessary and essential for the completion of a Sudra adoption. The non-observance of any other ceremony does not invalidate a Sudra adoption, as will be borne out by Hindu law and decisions.

"7. That from the judgment of the Court below it is clear that it has considered adoption in general, and not as a Sudra adoption only, which was the sole point for contention in this suit."

The 14th ground of appeal was—

"That the Court below was wrong in deciding that the delivery of the child and of the two primary documents was not proved, inasmuch as there was sufficient satisfactory evidence in the case to establish the same."

The appeal was transferred by the Judge to the Additional Judge. The latter did not try the issue whether there was an actual or formal delivery of the child or not. He said:—

"We now come to the merits of the case. The first point to be noted is, that the issue in this case has been unnecessarily widened. Appellant contended that ceremonies had been performed, and brought forward witnesses, who distinctly swore that not only the giving and taking, but a number of other religious rites were performed. It was, therefore, quite unnecessary on the part of the Lower Court to enter into the question of what rites are or are not essential to a Hindu adoption. If the Defendant's (Appellant's) witnesses are to be believed, not only essential but admittedly non-essential rites were performed. Defendant (Appellant) must abide by the evidence which he adduces, and stand or fall with it. His virtual plea is that all or many of the ceremonies were performed. He cannot, in the same breath, urge that one

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only (that of giving and taking) was performed, and that one only is necessary to the validity of a Sudra adoption.

"If the above view is correct, the simple issue in this case is, whether the ceremonies of adoption have been performed (as alleged by Appellant) or have not been performed.

"The Lower Court has found, after a careful inquiry and weighing of evidence, documentary and verbal, on either side, that no religious ceremonies of any sort were performed, and on the numerous grounds recorded in its judgment has expressed an opinion that Defendant's witnesses are not to be believed, whilst Plaintiff's (Respondent's) witnesses are stating the truth when they say that no ceremonies have ever been performed. The Lower Court also lays great weight on certain expressions used in a letter from Appellant, dated 13th Cheyt, 1271, which contains, in the Lower Court's opinion, expressions justifying the inference that, by Defendant's own admission, no religious ceremonies had been performed, and consequently no valid adoption had taken place. The question before this Court is, whether the finding of the Lower Court on the above question of fact is correct or not. If it is, Plaintiff's (Respondent's) claim for cancelment of documents must be decreed, for it is admitted on all hands that an adoption deed is void in the absence of a religious ceremony or ceremonies.

"After a careful consideration of the evidence, both verbal and documentary, adduced on either side, the conduct of the parties, and the various probabilities and improbabilities which have been brought to the notice of the Court by the counsel on either side, this Court has come to the conclusion that there is no valid reason for disturbing the finding of the Lower Court to the effect that no ceremonies were performed, and that consequently the deeds of adoption filed in the case are null and void.

"The appeal is, therefore, dismissed with costs."

The Defendant appealed specially to the High Court.

The fourth ground of appeal was—

"4. If any ceremonies were essential, the legal effect and weight of the evidence shew that such had been performed, and such evidence could not be affected by the failure of Defendant's witnesses to prove the performance of other non-essential ceremonies."

That ground of appeal was clearly directed to that part of the judgment of the Additional Judge in which, after saying that, if the Defendant's witnesses were to be believed, not only essential, but non-essential rites were performed, "he could not in the same breath say that one only—that of giving and taking—was performed."

It appears to their Lordships that the view taken by the Additional Judge was not correct. The question to be determined was not whether the child was legally adopted or not, but whether there was sufficient ground for setting aside the deeds or declaring them to be void. If the Defendant gave the child, or was willing to give the child, the Plaintiff had no right to sue him in order to have a declaratory decree that the deeds were null and void because certain religious ceremonies necessary to constitute a valid adoption had not been performed.

If the Defendant executed the deed of gift, which was admitted, and formally delivered the boy, it was the Plaintiff's own fault if she did not formally accept the child and cause the religious ceremonies to be performed. If she chose to execute a deed, declaring that the child had been adopted by her with the prescribed rites and ceremonies, when in fact the child had not been even given, it was her own fault.

The most important issue in the cause was, whether there was a formal gift of the child, or, in other words, whether there was an actual delivery of the child in addition to the execution of the deeds. That issue was not tried by the Additional Judge.

The Defendant appealed specially to the High Court, and that Court held that it was not necessary to determine whether or not a Sudra can be adopted without the performance of religious ceremonies, and dismissed the appeal upon the ground that there was no actual giving and receiving of the child. They said—

"We see no necessity to go into the question whether or not a Sudra can be adopted without the performance of religious ceremonies, namely, the offering of the burnt sacrifice, &c.

"The contention of the special Appellant is, that by the execution of two deeds, the one purporting to be a gift, and the other an acceptance of the child by the several parties respectively executing the deeds, there was a valid giving and receiving of the

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child, so as to make him the adopted son of the person who by these deeds appears to have accepted him as a son.

"We think there is no foundation for the argument of the special Appellant. It appears to us that the giving and receiving of a son in order to constitute a valid adoption, must be an actual giving and actual receiving of the child."

The High Court appears to their Lordships to have been in error in considering merely whether there was any valid adoption or not, instead of considering whether, if there was no adoption, it was owing to the fault of the Defendant, or to the fault of the Plaintiff herself. They also appear to have been wrong in holding on special appeal that there had been no actual giving of the child when the Additional Judge had not tried that issue. They say—

"By the grounds of special appeal filed, the Appellant does not suggest that there has been any actual giving and taking of the child, but only a constructive giving and taking by the execution of the deeds. We think that, assuming the facts relied upon as regards such giving and receiving to be established, it is not shewn that there was in this case any valid adoption. The change of name, supposed to be evidenced by the deeds, is not a sufficient overt act to shew that the child was given and received."

With reference to that statement it appears to their Lordships that the fourth ground of appeal to the High Court referred to that part of the decision of the Additional Judge in which he held that the Defendant could not rely upon the giving and taking alone, and that the only issue was, whether the religious ceremonies had been performed. The word "ceremonies" in the fourth ground of appeal to the High Court was clearly intended to include the actual giving and taking, or delivery and acceptance of the child, for the Judge treated this giving and taking as a ceremony, but as one upon which alone the Defendant could not rely. The judgment of the Judge is far from clear, arising from the use of the words "ceremonies" and "religious ceremonies." He treats the giving and taking as a ceremony, but whether as a religious ceremony is not clear. He finds that the decision of the Principal Sudder Ameen that no religious ceremonies were per-

formed was correct, and afterwards speaks of the same finding as one to the effect that no ceremonies were performed. Looking to the fact that the finding of the Principal Sudder Ameen, that there was no formal giving and taking, was distinct, and, in addition to his finding, that no religious ceremonies were performed, their Lordships think that the Additional Judge did not try or determine the issue whether there was a formal giving and taking notwithstanding the fourteenth ground of appeal to the Judge. This being so, it appears to their Lordships that the High Court were in error in deciding the case upon the ground that there was no actual giving and actual receiving of the child.

In the case of *Sreemutty Joymoney Dossee* v. *Sreemutty Sibosoonderee Dossee* (1), it was held by the Supreme Court in *Calcutta* that amongst Sudras no religious ceremony except in the case of marriage is necessary.

If the Judges of the High Court considered that this suit was maintainable if there was no valid adoption, they ought to have determined whether, in the case of Sudras any religious ceremonies were necessary to render an adoption valid, and if they considered that religious ceremonies were not necessary they ought to have directed the Judge to try whether there was a formal delivery of the child, or whether the Defendant refused to deliver him, an issue upon which the Defendant had appealed to the Judge from the finding of the Principal Sudder Ameen. If their Lordships thought that this suit could be maintained, they would now do what they consider the High Court ought to have done, but their Lordships do not consider that this suit is under any circumstances maintainable.

The suit is not to set aside the adoption, or to declare that there was no valid adoption, and thus to remove a doubt as to the child's title to the estates. It is merely to set aside the deeds. They were not actually necessary to render the adoption valid, and if they be set aside the Defendant or the child may prove the adoption *aliunde*.

It was stated by the Principal Sudder Ameen that the estates of the Plaintiff's deceased husband were of considerable value, paying a rental of Rs.40,000 a year. The suit was valued at only

(1) Fulton's Reports, 75.

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Rs.1500. The appeal to Her Majesty in Council was allowed upon the ground that the suit indirectly involved a claim to property of not less value than Rs.10,000. The Defendant pleaded that the suit was undervalued, but the Principal Sudder Ameen held, that as the pleader of the Defendant had not argued the point it might be presumed to have been given up. It would have been difficult for the Defendant to contend that the suit to have the deeds declared void or set aside was of greater value than Rs.1500. The case was accordingly tried as a suit of that value. The consequence was that the regular appeal went to the Judge, and only a special appeal to the High Court. If the suit had been valued at Rs.5000, the appeal to the High Court would have been a regular appeal, in which they, and, upon appeal from them, this tribunal, could have examined the evidence and determined the issues in fact.

If a decree be made declaring that the deeds are invalid, a suit may still be brought by the infant to try his title to the estates, and in that suit the evidence may have to be weighed by the High Court, and afterwards by the Judicial Committee of the Privy Council. It would be very unsatisfactory if the deeds should be declared void in the present suit, and the adoption should afterwards be upheld in a suit by the infant against the widow, or any other child who, upon the faith of a declaratory decree in this suit, may be given to the Plaintiff in adoption, and be adopted by her.

No fraud on the part of the Defendant has been alleged or proved; all that has been charged against him is that he refused to give the child, or to execute a deed in cancellation of the former deeds.

If the instruments operated merely as agreements to give and accept the child in adoption, as contended by the Plaintiff, the breach by the Defendant of his agreement to give would not render the deeds null and void. The breach of an agreement by one of the parties thereto is a good ground for an action for damages, or for a specific performance, but it does not render the contract void or constitute any ground for setting it aside, or for declaring it to be null and void.

The cause of suit is stated in the plaint to have arisen on the 10th Choitro, 1272, when the Defendant "denied executing,"

meaning "refused to execute," an ikrarnamah in cancellation of the ikrarnamahs aforesaid. One of the Plaintiff's objects, as stated in her plaint, in having the documents set aside, was to throw off the burden which was on her in consequence of the deeds. The High Court says:—

"There was no adoption. The natural father of the child now refuses to carry out his intention to give his child for the purpose of adoption. But the deeds are capable of being at any time used by him or his son to prove that there was an adoption. Under such circumstances, it is clear that the Plaintiff has a right to come to the Court to ask for relief, and pray to have the deeds declared void. We interfere for the protection of her right to her husband's property over which those deeds would cast a cloud, which it is necessary for the Plaintiff's security to remove."

Their Lordships have already alluded to the absence of any allegation or proof of fraud on the part of the Defendant, and also to the absence of any finding by the Judge upon the issue whether the Defendant formally gave the child, or refused to deliver him. If the child was lawfully adopted, the estates of the Plaintiff's deceased husband vested in him as son and heir, and the Plaintiff ceased to have the estate of a Hindu widow therein; she also ceased to have any power to adopt another son during the life of the child.

It has been held that under the 15 & 16 Vict. c. 86, s. 50, a declaratory decree cannot be made unless Plaintiff would be entitled to consequential relief if he asked for it : *Rooke* v. *Lord Kensington* (1). The 15th section of Act VIII. of 1859 is in similar terms. The Plaintiff, upon the facts found, is not entitled to any relief against the Defendant. It has been shewn that, treating the documents as mere agreements between the Plaintiff and the father of the child, the Plaintiff could have no right to maintain the present suit. Treating the instruments as deeds of gift and adoption, which their Lordships consider them to be, there is no consequential relief to which the Plaintiff would be entitled against the Defendant if the deeds be declared void. Though deeds of gift and acceptance are not actually necessary for the validity of

(1) 2 K. & J. 756; 25 L. J. (Ch.) 756.

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an adoption, they are still evidence in support of the child's title as an adopted son, and of his rights consequent upon the adoption. In a case of conflicting evidence, in a suit brought on behalf of the child against an adopting mother in respect of her deceased husband's estate, a declaration by her, whether by deed or word of mouth, that she had adopted the child with all necessary ceremonies would be strong corroborative evidence in the child's favour. In the present case there was conflicting evidence as to the fact of a formal giving and taking, as well as to the fact of the performance of the necessary religious ceremonies, and even upon the evidence of the Plaintiff's own witnesses, notwithstanding the allegation in the plaint that the child has remained in the house of his natural father, it appears that the child, whether adopted or not, did reside for some time in the house of the Plaintiff. There are also expressions in the letters from the Plaintiff's brother from which it might be inferred that the child had been adopted, and that the Plaintiff was desirous to have the adoption cancelled. Their Lordships express no opinion upon the evidence with reference to the fact of adoption, as the case is now before them merely upon appeal from a decision of the High Court upon special appeal.

It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for. There is so much more danger in *India* than here of harassing and vexatious litigation, that the Courts in *India* ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.

The child is no party to the present suit, and any declaration made in it with regard to the validity or invalidity of the deeds will not be binding upon him if a suit be hereafter brought on his behalf against the present Plaintiff respecting the estate of her deceased husband; nor would it be binding in any suit between the child and the reversionary heirs of the deceased husband after the death of the Plaintiff; or between the child and any other child who, upon the faith of a declaratory decree in this suit, may hereafter be given in adoption or adopted by the widow, or between

the child and his natural brothers, or any other person who may hereafter claim to exclude him from the heritage of his natural father's property upon the ground that he has been adopted into another family. It appears to their Lordships that, under these circumstances, it would not be exercising a sound discretion, even if it could be done, to order the deeds to be cancelled or to set them aside, or to declare them void. The Defendant takes no interest under the deed of adoption, a declaration binding upon him only and not upon the child would be worse than useless, for it would not protect the Plaintiff or any child whom she may adopt, from any claims on behalf of the Defendant's son to the estates; and it might induce some other person to give his son to the Plaintiff in adoption and also induce the Plaintiff to adopt another child when the declaration in the decree could not be of any possible use to them.

If the Defendant's son was adopted the Defendant had no power to cancel the deed of adoption or to give the Plaintiff permission to adopt another son. Nor would his refusal to send back to the Plaintiff her adopted son, or the fact of his harbouring him in his original home, invalidate the adoption. Whether the child was adopted or not the Defendant was not bound to execute a deed in cancellation of the former documents, and his refusal to execute such a deed could not give the Plaintiff a cause of action as alleged in her plaint, or rightly subject the Defendant to the costs of the suit which have been awarded against him.

It was suggested that a suit against the father, in his own right and as guardian of his minor son, was tantamount to a suit against the father and the son. But that is not correct. If the son had been made a co-Defendant, it would have been necessary to have a guardian appointed for him. If the child was adopted, his natural father was not his guardian. In a suit by the Plaintiff to set aside the deeds upon the ground that there had been no adoption, the Plaintiff had no more authority to constitute the father the guardian of his son, by suing him as guardian, than the father would have had to constitute the Plaintiff the guardian of the child, if he had sued her for a declaration that the child had been validly adopted.

This is not a mere technical objection. If the father really

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refused to give the child in adoption, because he did not desire to have him adopted, he was not the proper person to protect the child's interest, or likely to make the best case on his behalf in a suit to declare the adoption invalid. In making these remarks their Lordships do not desire to impute to the father, in the present case, any neglect of his son's interests, for he appears to have desired to establish the adoption, and to have acted properly in refusing to execute a deed of cancellation when under the belief, whether right or wrong, that the adoption was complete.

The law is clear upon the subject of guardianship of male minors.

By Act No. 40 of 1858, passed before this suit was instituted, it was enacted that the care of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court; and by sect. 3 it is enacted that where the property is of small value the Court having jurisdiction may allow any relative of a minor to institute or defend a suit in his behalf. In other cases a certificate of administration is necessary.

The suit must be treated as one against the Defendant, the father, alone; and for the reasons above given their Lordships will humbly advise Her Majesty that the decree of the High Court, and the decrees of both the Lower Courts, be reversed, and that the suit be dismissed, and that the Plaintiff (the Respondent) do pay to the Defendant (the Appellant) the costs of this appeal and the costs in all the Lower Courts.

It is hardly necessary to add that this decision will be no bar to the trial of the question whether the child was or was not duly adopted in any suit properly framed for that purpose.

Agent for Appellant: *F. Barrow.*
Agent for Respondent: *T. L. Wilson.*

SADUT ALI KHAN . . . . . DEFENDANT;

AND

KHAJEH ABDOOL GUNNEE . . . . . PLAINTIFF.

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KHAJEH ABDOOL GUNNEE . . . . . PLAINTIFF;

AND

MUSSUMAT ZAMOORUDOONNESSA KHANUM . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Act. VIII. of 1859, *s.* 15—*Declaratory Decree—Consequential Relief in Court other than that which makes Declaratory Decree.*

A merely declaratory decree may be made without granting any consequential relief, or where the party does not actually seek for consequential relief in the particular suit. The Court must see that the declaration of right may be the foundation of relief to be got somewhere, *e.g.*, in a Court other than that where the declaratory decree is sought. Thus a declaration of title may be made in a Civil Court with a view of the Plaintiff suing under Act. X. of 1859, for enhancement of rent in a Revenue Court.

Where a discretion to make such decree is shewn to exist, the Privy Council will not upon light ground interfere with the exercise of that discretion.

FIRST appeal from a decree of the High Court (Feb. 4, 1868), reversing a decree of the Principal Sudder Ameen of *Mymensingh* (April 10, 1867).

Leith, Q.C., and *Doyne*, for the Appellant.

Cowie, and *Romer*, for the Respondent.

Second appeal from a decree of the High Court (Aug. 26, 1870), affirming a decree of the Deputy Collector of *Attiah* in *Mymensingh* (Nov. 16, 1869).

Cowie, and *Romer*, for the Appellant.

Leith, Q.C., and *Doyne*, for the Respondent.

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

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The facts of the case are stated in the judgment of their Lordships.

. . . . . .

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

In delivering judgment upon these appeals their Lordships think it necessary, in the first place, briefly to review the history of this litigation.

Fyz Ali Khan, a Mahomedan zemindar in the district of *Mymensingh*, died on the 16th of December, 1824, leaving two widows and a son. The son is the Appellant in the first, and the husband of the Respondent in the second appeal.

The widows were *Shums-oon-nessa* and *Reazoon*, who was the mother of the Appellant *Sadut Ali Khan*. *Fyz Ali Khan*, upon the occasion of his marriage with *Shums-oon-nessa Begum*, had contracted to give her a certain dower, of which one third was to be prompt; and it appears to have been agreed on the same occasion, that he should, in satisfaction of that portion of the dower which was prompt, make over to her, as he accordingly did make over by a kabinnamah, twenty-two villages forming part of his zemindary. A partition was then in the course of being made between him and his co-sharers in the larger zemindary of which that property which, for the purposes of this suit, may be called his zemindary, was part; on that partition three of the villages comprised in the kabinnamah fell to the lot of one of his co-sharers; and it is contended on the part of *Sadut Ali* that thereupon an ikrarnamah was, a year after the marriage, executed by *Fyz Ali*, by which he substituted three other villages forming part of his zemindary in the place of those three villages, and created a sub-tenure or dependent talook out of the twenty-two villages as then constituted under the name of *Russoolpoor*, on which he received a gross rent of Rs.49.

In the second suit a considerable contest has been raised as to the genuineness of the ikrarnamah, but it is perfectly certain that by some means or another the substitution of the three new villages for the three former villages did take place; and that whereas the kabinnamah was silent as to the reservation of any

rent, the twenty-two villages were afterwards held upon the terms of paying a rent of Rs.49.

It will be more convenient, since it is necessary to keep the two appeals in some measure distinct, to consider the objections made to the genuineness of the ikrarnamah when their Lordships come to consider that suit, and to assume that, either by the ikrarnamah or some other means, the twenty-two villages really did become a sub-tenure paying one rent of Rs.49.

Immediately upon the death of *Fyz Ali* there began a litigation concerning his estate, which has continued nearly up to this time, and constitutes an amount of litigation concerning one estate which one would fain hope is singular even in *India*. Their Lordships do not think it necessary to go through the history of that litigation further than may be required in order to shew the precise relation in which the parties to these appeals stand to each other.

The first suit was brought by *Reazoon Begum*, on her own behalf and as guardian of her infant son *Sadut Ali*, against *Shums-oonnessa Begum*, who had got into possession of the whole estate; and had called in question the marriage of *Reazoon* with *Fyz Ali* and the legitimacy of *Sadut Ali* in order to establish the right of herself and her son to share in the estate. That suit went through all the Indian Courts, and was ultimately brought before this Committee. In 1844 Her Majesty made a final order affirming the decisions of the Indian Courts, which were in favour of the rights claimed by the Plaintiffs.

Pending that litigation, *Khajeh Azim Oolah*, the father of the party who is the Respondent in the first appeal and the Appellant in the second appeal, had made advances to *Reazoon* for the purpose of enabling her to carry on her suit; and, as is usual in *India*, those advances ended in an arrangement by which she agreed to give him one moiety of what should be recovered in that suit. That agreement was afterwards confirmed by *Sadut Ali Khan* upon obtaining his majority; and there is no question now upon the present appeals that it was a good and binding agreement, and that it was the foundation of the title of the present Khajeh, who has succeeded to the rights of his father.

It is not immaterial, with reference to some of the arguments

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which have been addressed to their Lordships at the Bar, to observe that although the agreement was originally for one moiety, which would be 7½ annas of the 15 annas which were finally decreed to the mother and her son, the Khajeh, upon a representation founded on the existence of the sub-tenure and the poverty of *Reazoon* and her son, agreed to waive his rights as to half an anna, and that the ultimate arrangement was that he should take only 7 of the 15 annas. It is therefore clear that the ultimate contract between the parties was made with a full knowledge of the existence of the sub-tenure. And if matters had remained as they then were, the rights of the parties would have stood thus: *Reazoon Begum* would have been entitled to one anna of the zemindary right; *Shums-oon-nessa Begum* would have been entitled to another anna of the zemindary right and also to the talookdary interest in the villages; *Sadut Ali Khan* would have been entitled to seven annas of the zemindary right; and *Khajeh Abdool* would have been entitled to seven annas of the zemindary right.

It had been expressly provided by the original decree of the Sudder Court, which was affirmed by Her Majesty in Council, that the villages which formed the sub-tenure were to be taken as separated from the corpus of the estate, subject of course to any rent which might be payable in respect of them to the zemindars; and the division of the assets of the zemindary between *Reazoon* and her son on the one side and *Shums-oon-nessa* on the other was accordingly made on that footing.

The position of the parties, however, was afterwards changed. *Shums-oon-nessa Begum* had died pending her appeal to Her Majesty in Council. It was prosecuted by her heir and brother *Hedayetoolah;* and he having failed to pay, pursuant to the Order in Council, the costs of the appeal, her interest in *Fyz Ali's* estate, which had descended to him, and of which he was then in possession, was attached and put up to sale. It was bought by *Sadut Ali,* who afterwards transferred the sub-tenure, and possibly the whole of what he bought, to his wife, who is the Respondent in the second appeal.

There is some evidence that in the first instance the Khajeh was put into some kind of constructive possession of the seven annas of

the zemindary which had been assigned to him; disputes afterwards took place between the parties, and he found it necessary to bring a suit in order to enforce his rights under the purchase. In that suit a final decree was made in his favour in 1853. Thereupon the rights and position of the parties seem to have been as follows: The wife of *Sadut Ali Khan*, *Zamoorudoon-nessa*, as the holder of the sub-tenure, was entitled to the beneficial interest therein; but whatever rent was payable by her to the zemindary was divisible between those entitled to the zemindary according to their respective shares; the Appellant being entitled to seven annas of that rent, whatever it might be. As soon as the decree had been made in his favour, he seems to have conceived the notion that he was entitled as zemindar to enhance that rent; and he took proceedings on two occasions, before he brought the suit which has given rise to the first appeal, in order to establish his right to enhance. He was unsuccessful upon both occasions; and upon the last doubt was thrown upon his title to claim a zemindary right in respect of the villages included in the sub-tenure.

Thereupon he instituted the suit out of which the first appeal has arisen. The Defendants in that suit, *Sadut Ali Khan* and his wife, although, as will presently be shewn, they had on a former occasion admitted the Plaintiff's right to share in the rent reserved on the twenty-two villages, saw fit to contest that right, and alleged that no zemindary right in respect of the village had passed under the purchase to *Khajeh Azim Oolah*. They also contended that if any had passed the Plaintiff had never received any rents, and that by reason of his non-reception of any share of the rent for a period of more than twelve years his suit was barred by limitation. Formal issues were settled to raise these defences, and the cause was tried upon them. These were the real points upon which the case was fought in the Courts below; and it has now been admitted at the Bar by Mr. *Leith* that he cannot support the first of them. It is then conceded that, by reason of the transfer to the Khajeh of the seven annas' share in the zemindary, he became entitled to a proportionate share of the Rs.49 reserved upon the twenty-two villages.

It was however contended and fully argued by Mr. *Doyne* that the suit was barred by the *Statute of Limitations*. Their Lord-

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ships have fully considered the able argument that was addressed to them upon that point, and they are not satisfied that the *Statute of Limitations* was a bar to the suit. The circumstance which was chiefly relied upon by the High Court and made the principal ground of their judgment, was that in the course of the suit which the Khajeh brought to enforce his rights under the agreement for purchase, a large sum for mesne profits became due from *Sadut Ali Khan* to him; that ultimately there was a compromise between them which fixed the amount to be paid at, I think, Rs.70,000, which sum was actually paid to him within the twelve years. It was argued, however, by Mr. *Doyne* that the last item of the rent of the villages which could have entered into the sum for which that compromise was made must have been rent which had accrued more than twelve years before the commencement of the suit. Their Lordships are nevertheless not disposed to dispute the view of the High Court that the payment of the sum taken to include the annas of that rent within the twelve years was evidence of a recognition of the title of the Khajeh to the rent, which is sufficient to exclude the notion of an adverse possession for more than twelve years before the institution of this suit.

The case, however, of the Respondent does not appear to their Lordships to depend solely upon that admission. There has been throughout this long litigation a good deal of what one may call blowing hot and cold; and it certainly appears that in the first of the proceedings which were taken anterior to the suit for the purpose of enhancing the rent, the contention of the Defendants was this:—"True, you are entitled as zemindar to a proportionate share of the existing rent of this talook, but you are not entitled to enhance that rent." Therefore it appears to their Lordships that this is not a case to which the *Statute of Limitations* could fairly or properly be applied.

That disposes of the points which were really the grounds of defence taken in the Courts in *India*. It was, however, strenuously argued that the suit ought to fail, because it is a suit for a mere declaratory decree seeking no consequential relief. And the objection, as their Lordships gather, which was so taken at the Bar was twofold: first, that no such suit would lie unless some consequential relief could be granted as ancillary to it; and

secondly, that to entertain such a suit is a matter of discretion in the Court, and that the Court had in this instance exercised its discretion unsoundly.

Now, with respect to the last of these objections, it might be sufficient to say that if the High Court has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion. Nor, assuming that there was a discretion to entertain the suit, do their Lordships think that in this case it was unsoundly exercised. The Respondent in his last suit for enhancement had been turned round on the ground that he had not any zemindary right in these villages, and he naturally came into the Civil Court in order to have that right ascertained and declared. And if his suit had been dismissed after the parties had joined in the issues in which they did join, the decree would have been a bar to his right to recover even his proportionate share of the rent of the Rs.49.

Their Lordships have now to consider the first objection.

It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th section of the *Code of Civil Procedure* would have no operation at all. What their Lordships understand to have been decided in *India* on this article of the Code, and in the Court of Chancery upon the analogous provision of the English statute, is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party, or was sought by him, than the right to try his claim to enhance in the other forum in which he is now compelled by statute to bring an enhancement suit. It was a necessary preliminary to such a suit that he should establish his right to a share in the zemindary title.

Therefore upon both grounds it appeared to their Lordships yesterday on the close of the Appellant's case that he had failed to shew any reason for disturbing the decision of the High Court

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in the first suit, and that the decree which was the subject of this appeal ought to be affirmed.

Now it is not unimportant with reference to the second appeal to see what that decree was. It is in these words:—"It is ordered and decreed by the said Court that this appeal be decreed, and the decree of the lower Court be reversed. And it is declared that the twenty-two villages in the suit comprise a tenure situated within and being part of and and paying a rent of Rs.49 to the proprietors of the zemindary No. 10 on the Towjee of the Collector of *Mymensingh*, comprising five annas, one gundah, one cowrie, and one krant of pergunnah *Ateeah*. And it is further declared that Plaintiff is a proprietor of seven annas out of fifteen annas of that zemindary, and that as proprietor he is entitled to a share of the rent of this tenure in proportion to his interest in the estate." It seems to their Lordships impossible for the Appellant who was the Plaintiff in the second suit to go behind that decree, and to say that the twenty-two villages did not constitute a tenure within the zemindary, on which a gross rent of Rs.49 was reserved to the zemindars.

Having got this decree the Khajeh proceeded to bring his suit for enhancement against *Zamoorudoonessa Begum* as the holder of the tenure. Among the issues settled in that suit there were these: 1st. Whether the notice had specified the particulars required by law to be specified, and whether it had been duly served. And the second, which was the material one, is in these words: "Are the villages in question liable to enhancement of rent as stated by the Plaintiff, or fit to be exempted from increased assessment, being held by Defendant at a fixed rate in perpetuity under a lekhun granted by the former zemindar." The notice, it was admitted, was a notice which was necessarily given under the 13th section of Act X. of 1859. In the view their Lordships have taken of the second issue it is not necessary for them to consider whether that notice was sufficient. The Deputy Collector who tried the case in the first instance considered that it was sufficient. Some doubt was thrown upon that by Mr. Justice *Phear* in the High Court. He seems to have considered it insufficient; but their Lordships think it will be far more satisfactory to decide this case upon its merits, and the question raised by the second

issue, viz., whether the rent is enhanceable or not, in a suit regularly framed.

The foundation of the tenant's title was the kabinnamah; and the transaction upon the face of the kabinnamah was a transfer of the twenty-two villages included in it to *Shums-oon-nessa* in satisfaction of the one-third of her agreed dower. It did not reserve any rent whatever. It did not make any mention of or provision for the payment of the Government revenue payable in respect of those particular villages; and though it did not contain any words of inheritance in the strict sense of the term, it did not contain any express direction that the enjoyment of the villages granted should be limited to any particular time. The nature of the transaction affords strong ground for the conclusion that the villages were intended to be made over absolutely, and for all time; because the woman was entitled to the third of her dower absolutely. She might have disposed of that as she pleased; and when, in lieu of that she took a grant of the villages the presumption is that she was intended to take an absolute interest. Again, the hereditary nature of her interest seems to be almost put beyond a doubt by the decree in the first suit, which is the foundation of the Khajeh's title, because when she died her heir, who was appointed to carry on the suit in her place, did so, and the decree contains a direction concerning these villages, notwithstanding her demise, which implies the existence of the tenure. Nor does the hereditary character of the tenure seem to have been disputed up to the present time.

It may seem strange that no provision was made expressly in the instrument for the payment of the Government revenue. But the zemindar may have been willing to take the whole of the Government revenue upon himself; and his doing this may have been an element in the settlement of the terms upon which the third of the dower was to be given up. Of course such a transaction might be impeached by a purchaser of the zemindary for arrears of Government revenue. But it is nevertheless good against all who claim title under *Fyz Ali Khan*.

Nor can the fact that the instrument is silent concerning the payment of the Government revenue affect the questions raised by this appeal; because even if the grant be taken to be a grant of

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the villages subject to the payment of the Government revenue, and the zemindar may have paid the Government revenue on account of the tenant, his right to recover what he has so paid could not enter into a suit for enhancement of rent, but would be a matter for which he must seek his remedy in a Civil Court.

The question of the ikrarnamah is now to be considered. Their Lordships find that the validity of this instrument has been affirmed by the concurrent judgment of both the Indian Courts. They do not deny that there may be circumstances which throw some suspicion upon it, or that it is a document which has not satisfied all the officers before whom it appears to have been produced; but upon the whole they can see no sufficient grounds for disturbing the finding of the Courts below. The Plaintiff cannot be heard to say that there was not a substitution of three villages for three of those included in the kabinnamah; or that the twenty-two villages were not afterwards held as a sub-tenure on which a rent was reserved. He comes into the Court, having got a declaration in the other suit that such was the fact, and alleging that by reason of it the relation of landlord and tenant subsisted between him and the Defendant, and he fails to shew by what means other than the ikrarnamah the substitution of the villages and the creation of the tenure took place.

Therefore, it seems to their Lordships that they must accept the ikrarnamah as established, and act upon it accordingly. If they do that, it appears to them that inasmuch as the ikrarnamah declares the rent to be permanent, the case for enhancement altogether fails, and that the decree of the Indian Courts in the second suit ought also to be affirmed.

The result will be that their Lordships will humbly advise Her Majesty to affirm both the decrees under appeal, and to dismiss each appeal with costs.

Agent for Appellant in first and Respondent in second appeal: *W. H. Oehme.*

Agents for *Khajeh Abdool Gunnee: J. S. & A. P. Judge.*

JAMES SCOTT ELLIOTT AND OTHERS . PLAINTIFFS;

AND

BHOOBUN MOHUN BONNERJEE AND OTHERS . . . . . } DEFENDANTS.

J. C.*
1873
Feb. 12.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Prescription—Light and Air—Acquiescence—Constructive Knowledge by Owner of servient Tenement.

In a suit for an injunction praying that the Defendants might be restrained from proceeding with a certain building, and that a portion of it might be taken down, which had the effect of obstructing the light which the Plaintiffs alleged they were entitled to have through their windows, it appeared that the origin of the alleged right had accrued more than twenty years previously, but that before the expiration of twenty years therefrom the owner of the servient tenement commenced the obstruction complained of:—

Held, that as 2 & 3 Will. 4, c. 71, did not apply, the case must be governed by the English law previous to that enactment; and that as enjoyment for twenty years with the acquiescence of the owner of the servient tenement was not proved, and could not, under the circumstances, be presumed, the suit must be dismissed.

Quære, whether acquiescence by the owner of the servient tenement may be presumed from proof of actual knowledge of the obstruction on the part of his agent who collected his rents and fixed their amount.

APPEAL from a decree of the High Court (Nov. 14, 1870), reversing a decree of *Norman*, J. (June 27, 1870), which granted the relief prayed for in the plaint.

The object of the Appellants' suit, brought 18th of May, 1870, was to have the Respondents restrained by injunction from obstructing the passage of light and air through certain windows on the Appellants' premises, being No. 40, *Strand, Calcutta*, by the erection of a new building on the Respondents' adjacent ground. The material questions raised in the suit were, whether the Appellants' firm had enjoyed uninterrupted passage of light and air for twenty years before the obstruction complained of, and whether with the acquiescence of the Respondents and their predecessor in

* *Present*:—LORD JUSTICE JAMES, SIR BARNES PEACOCK, LORD JUSTICE MELLISH, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

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estate, and whether the erection complained of did materially interfere with the right claimed.

In 1847 the Appellants' predecessors purchased No. 40, *Strand*, as a place of business; at that time the building existing on those premises was one-storeyed; but towards the end of 1849 they caused to be added a second storey, and the windows for the obstruction of which the suit was brought were three windows in the second storey so built, looking to the north side and into the lands and premises of the Respondents. Evidence was given to shew that the room lit by these windows was used as an office, and particularly for the examination of samples of silk and indigo, which according to the testimony of several brokers and experts could in *Calcutta* only be safely and satisfactorily examined by exposure to a northern light. The Appellants' enjoyment of the light was found to have "commenced not later than the 14th of April, 1850, and not improbably as early as February of that year." At the time of the erection of the second storey in question the Respondent's land belonged to the Rajah *Ramchunder*, who came to reside in *Calcutta* in 1853–4, at which time the land was in part occupied by a temple, and by huts and shops, and was in part used for the depositing of chains, anchors, and other marine stores belonging to dealers who rented the ground at varying rents from the Rajah. In 1854 a brick-built messuage was placed exactly opposite four of the seven windows of the Appellant's second storey; and in 1870 a godown was erected by the Respondents opposite the then remaining windows. The building thereof was commenced in March, and an intention to erect the godown was prior to the commencement thereof communicated to the Appellants by the Respondents.

The first Court (*Norman*, J.) held that as a fact the Appellants' firm had uninterruptedly enjoyed the access of light to the windows in question for twenty years before the obstruction complained of, and that such enjoyment was presumably with the knowledge and acquiescence of the Respondents and their predecessor in estate, and that the obstruction complained of did substantially interfere with such access.

The lower Appellate Court did not disagree with the Court of first instance as to the enjoyment having been without interrup-

tion for twenty years before suit, or as to the obstruction in question being material; but assuming that to be so, held that under the circumstances of the case, and upon the decisions applicable to it, knowledge and acquiescence on the part of the Rajah were not established.

The judgment of the High Court (*Couch*, C.J., and *Markby*, J.), was as follows:—

"As the premises are situated within the limits of the ordinary original civil jurisdiction of this Court, the law to be applied to the case is the English law, as it was before the passing of the *Prescription Act*, 2 & 3 Will. 4, c. 71, which does not extend to *India*. We are bound to apply this law whether we approve of it or not; and for myself I may say that I agree in what the late eminent Chief Justice of this Court said in *Bagram* v. *Khettranath Karformah* (1):—'I cannot say that the English law of presumption as to light and air, where nothing is done on the servient tenement which the owner of it could prevent by action, is the perfection of reason. But it has grown from time to time to meet men's wants, and it has been founded upon actual or supposed principles of convenience.' I shall first endeavour, by an examination of the decisions of the English Courts, to determine what the English law was before the passing of the *Prescription Act*, and then apply it to the evidence in this case."

Reference was then made to the following authorities: *Blanchard* v. *Bridges* (2); the cases reported in 2 *Wms. Saunders*, 175A., viz.: *Lewis* v. *Price*, *Dougal* v. *Wilson*, *Darwin* v. *Upton*; *Daniel* v. *North* (3); *Gray* v. *Bond* (4); *Cross* v. *Lewis* (5); *Palk* v. *Skinner* (6); *Bagram* v. *Kettranath Karformah* (7); *Gale* on Easements, p. 108.

The judgment then proceeded as follows:—

"These authorities, it appears to me, shew that by the English law before the *Prescription Act*, the presumption of a grant in the case of a claim to the access and use of light for a building was a presumption of fact, the presumption being founded on the consent

(1) 3 Bengal L. R. O. J. c. 51.
(2) 4 A. & E. 176.
(3) 11 East, 372.
(4) 2 B. & B. 667.
(5) 2 B. & C. 686.
(6) 18 Q. B. 575.
(7) 3 Beng. L. R. O. C. 18.

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or acquiescence of the owner of the servient tenement. For acquiescence or consent knowledge is necessary. A man cannot be taken to consent to what he does not know of, but where he was in possession his knowledge was presumed, and the non-obstruction was taken to be proof of his acquiescence, and in such cases the jury were directed that they ought to presume a grant; and, as is said by *Parke*, B., in *Bright* v. *Walker* (1), 'Though in theory it was presumptive evidence, in practice and effect it was a bar.'

"But it was otherwise where the owner was not in possession. In that case, if there was no direct evidence of his knowledge of the enjoyment, it was for the jury to say whether, from the circumstances proved, and having regard to the nature of the easement that had been enjoyed, it might fairly be presumed. If they thought it might, then, if there had been no obstruction, a grant ought to be presumed. Whether, when there had been an enjoyment for twenty years, and knowledge by the owner of the servient tenement for only a part of that time, a grant ought to be presumed, does not appear to have been ever decided. I think as twenty years' enjoyment with acquiescence is necessary, there must be knowledge for that period; and at least, if the knowledge were for a lesser period, it would be a question for the jury whether there was a grant and not a presumption, which they would be bound to make."

Reference was then made to *Bright* v. *Walker* (2); *Webb* v. *Bird* (3).

Kay, Q.C., *Cowie*, Q.C., and *Doyne*, for the Appellants, referred to most of the authorities cited in the above judgment, and argued that there had been no interference with the right claimed until May 1870, *i.e.*, after the expiry of twenty years from the 14th of April, 1850, the date upon which upon the evidence its origin had accrued.

Field, Q.C., and *Bell*, for the Respondents, were not called upon.

(1) 1 C. M. & R. 217. (2) 1 C. M. & R. 219.
(3) 31 L. J. (C.P.) 335.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This was a suit for an injunction praying that the Defendants might be restrained from proceeding with a certain building, and that a portion of it might be taken down, which had the effect of obstructing light which the Plaintiffs alleged they were entitled to have through their windows. It would appear that the windows in respect to which the right to the light is claimed, were so far completed on the 14th of April, 1850, that the origin of the right would then accrue; that is the finding of Mr. Justice *Norman*, the judge of first instance, a finding in which their Lordships concur.

The suit was commenced on the 18th of May, 1870, rather more than a month beyond the expiration of twenty years from the former date of April 14th, 1850.

It is admitted that the *Prescription Act*, the 2 & 3 Will. 4, c. 71, does not apply, and that we must have resort to the English law which prevailed before its passing. So far as this would seem to be clear, that the Plaintiffs, in order to establish their title, would have to shew an uninterrupted user of at least twenty years, with the acquiescence of the Defendants, the owners of the servient tenement. But some questions of nicety have been raised as to what would or would not amount to acquiescence, and it was discussed whether actual knowledge was necessary to be shewn on the part of the Defendants. That proof of such actual knowledge was necessary, appears to have been the view of the Court above, which reversed the decision of Mr. Justice *Norman*, the judge of first instance, and found as a fact that actual knowledge was not shewn to have existed on the part of the Defendants. If the decision of the case rested upon this point, their Lordships would have desired to hear further argument, because they are by no means satisfied that knowledge on the part of the agent, who acted for the Rajah, the owner of the property in 1850 (from whom the Defendants purchased), who collected his rents, and, further, was entrusted with the authority of fixing their amount, would not be constructive knowledge on the part of the Rajah, sufficient to satisfy the exigence of proof on the part of the Plaintiffs.

Another question arose in the case as to whether the fact of the premises being let to tenants at, as it would appear, a monthly

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rent, on the commencement of the accruing of this right, namely, in 1850, would have had any bearing upon the rights of the parties. But their Lordships do not think it necessary to enter into a discussion of these questions, because they have come to the conclusion, independently of them, that the Plaintiffs have not established an uninterrupted user of these lights for the space of twenty years, with the acquiescence of the Defendants. It must be taken that the enjoyment commenced on the 14th of April, 1850. It would appear that in March, 1870, the Plaintiffs received a notice from the Defendants, or, at all events, they were informed by the Defendants that it was their intention to erect a building of twenty-four feet or more in height on the north of the premises of the building in question, which would have the effect undoubtedly of obstructing their lights. It appears that that building was actually commenced on the 23rd of March, 1870, and its construction was continued. It is true that it was not raised to such a height as to actually amount to an obstruction until some days after the twenty years had elapsed; but it was commenced, and commenced with the manifest intention of being erected as an obstruction before the expiration of the twenty years.

Under these circumstances it appears to their Lordships that it is quite impossible to presume enjoyment for twenty years with the acquiescence of the owner of the servient tenement, when before the expiration of those twenty years, the owner not merely gave notice of his intention to interfere with that enjoyment and to raise an obstruction, but in pursuance of that notice actually commenced the erection of that obstruction which was completed a few days after the expiration of the time in question.

Under these circumstances their Lordships have come to the conclusion that there was not an enjoyment for twenty years on the part of the Plaintiffs, with the acquiescence of the Defendants such as to entitle them to maintain this suit.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Appellate Court, the High Court of *Calcutta*, be affirmed, and this appeal dismissed, with costs.

Agent for Appellants: *F. Barrow.*
Agents for Respondents: *R. Oldershaw & Son.*

RAJAH LEELANUND SINGH BAHADOOR AND OTHERS . . . . . } PLAINTIFFS;

AND

THAKOOR MUNOORUNJUN SINGH AND ANOTHER . . . . . } DEFENDANTS.

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RAJAH LEELANUND SINGH BAHADOOR AND OTHERS . . . . . } PLAINTIFFS;

AND

THAKOOR MUNOORUNJUN SINGH AND ANOTHER . . . . . } DEFENDANTS.

THAKOOR MUNOORUNJUN SINGH AND ANOTHER . . . . . } CLAIMANTS;

AND

RAJAH LEELANUND SINGH BAHADOOR (ONE OF THE DEFENDANTS) AND THE GOVERNMENT (PLAINTIFF) . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Ghatwali Tenures—Resumption—Auction Purchaser—Reg. XLIV. of 1793.

Held, that certain ghatwali tenures which had been created before the permanent settlement at a fixed rent could not be determined by a zemindar dispensing with the ghatwali services (which as between him and the Government were no longer required), so long as the ghatwals were willing and able to perform those services.

Held, that certain other ghatwali tenures which had been created after the permanent settlement could not, under Regulation XLIV. of 1793, be cancelled by a purchaser at a sale for arrears of Government revenue.

The Government having wrongfully resumed certain ghatwali lands were directed to refund mesne profits thereof, which consisted of the rent paid by the ghatwals under a settlement in force with them until the resumption was set aside:—

Held, that inasmuch as the ghatwals held the lands upon a tenure by

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

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which they were liable to certain rent and services, such refund should be made by paying to the zemindar the rent which was due to him by the ghatwals under the tenures, and returning to the ghatwals the remainder of the money.

APPEALS in the first two cases from two decrees of the High Court (June 17 and 29, 1865), reversing two decrees of the Principal Sudder Ameen of *Bhagulpore* (June 21, 1864).

Rajah *Leelanund* and others sued in these cases to recover certain ghatwali lands within the Rajah's zemindary of *Khuruckpore*, the subject of the first suit being a talook called *Khukwara*, and that of the second a mouzah called *Dudhäri*.

The facts appear in the judgment of their Lordships.

Leith, Q.C., and *Doyne*, for the Appellants in the first cases, contended that the office of ghatwal was not shewn to have been hereditary, but dependent on the will of the zemindar. An hereditary claim could not be founded on Captain *Brown's* sunnud; and, moreover, the Respondents' predecessors had taken a new grant under a subsequent sunnud, under which the Rajah had a right to dismiss. In the second case they relied in addition upon a sunnud filed therein by the Respondents, under which the power of removal was claimed.

Bell, for the Respondents in both cases, contended that the Respondents' tenure was analogous to that of the ghatwalis of *Bharbhoom*, as described in Regulation XXIX. of 1814; that they had done nothing to forfeit their estate; and that the fact of the Rajah having been an auction purchaser at a sale for arrears of Government revenue gave him no power of resumption.

The cases cited were *Tekayat Jugmohun Singh* v. *Rajah Neelanund Singh* (1); *Mussamut Sona* v. *Rajah Leelanund Singh* (2); *Rajah Neelanund Singh* v. *Surwan Singh* (3); *Rajah Neelanund Singh* v. *Nusseeb Singh* (4); *Makhul Hossein* v. *Patasu Kumari* (5); *Mussumut Ameeroonissa Begum* v. *Maharajah Hetnarain Singh* (6); *Kooldeep Narain Singh* v. *Government of India* (7); *Rajah Anund-*

(1) Beng. S. D. A. (1857), p. 1812; Beng. S. D. A. (1858), p. 1471.
(2) 5 Suth. W. R. 290.
(3) Ibid. 292.
(4) 6 Suth. W. R. 80.
(5) 1 Beng. L. R. A. C. 120.
(6) Beng S. D. A. (1853), p. 648.
(7) 14 Moore's Ind. Ap. Ca. 247; 11 Beng. L. R. 71.

lall Deo v. *Government of Bengal* (1); *Ranee Surnomoye* v. *Maharajah Sutteeschunder Roy Bahadoor* (2); *Rajah Satyasaran Ghosal* v. *Mahesh Chundra Mitter* (3).

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Appeal in the third case from a decree of the High Court (*Lock* and *Glover*, JJ.) acting as Special Commissioners (August 25, 1868).

The question in this case was whether the ghatwals of talook *Khukwara* or the zemindar *Rajah Leelanund Singh* were entitled to recover the revenue paid by the ghatwals to the Government under the settlement made with them after a decision of the Special Commissioner (June 27, 1845), declaring the right of the Government to resume and assess the ghatwali lands of *Khuruckpore*.

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The facts appear in the judgment of their Lordships.

THAKOOR MUNOORUNJUN SINGH v. RAJAH LEELANUND SINGH BAHADOOR.

Bell, for the Appellants.

Leith, Q.C., and *Doyne*, for the Rajah Respondent.

Forsyth, Q.C., and *Merivale*, for the Government.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

RAJAH LEELANUND SINGH AND OTHERS *v.* MUNOORUNJUN SINGH AND ANOTHER.

The Plaintiffs in this suit, *Rajah Leelanund Singh* and others, brought a suit to recover possession of talook *Khukwara* in the zemindary of *Khuruckpore*. The Plaintiffs were purchasers under a sale for arrears of revenue against *Kadir Ali*, the former zemindar of the zemindary; but their Lordships are of opinion that as auction purchasers they have no greater rights, so far as this case is concerned, than they would have had as original zemindars. Indeed, that point has been admitted by the learned counsel who argued this case on behalf of the Appellants. The other Plaintiffs are merely lessees of the zemindars; and the case may be treated

(1) Beng. S. D. A. (1858), p. 1669.
(2) 10 Moore's Ind. Ap. Ca. 123.
(3) 12 Moore's Ind. Ap. Ca. 263; 2 Beng. L. R. P. C. 23.

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as a suit by the zemindars of *Khuruckpore* against the Defendants, to recover possession of the talook *Khukwara*.

The question is, whether they are entitled to recover possession of that talook. Their contention is that it was held as a ghatwali tenure, and that they have a right, when the ghatwali services are dispensed with and not required, to take possession of the lands which were held subject to those services.

The earliest sunnud that we find is one granted by Captain *Brown* in the year 1776 to *Rankoo Singh* and *Bhyro Singh*, who were the ancestors of the present Defendants. By that grant the talook in question was granted at a rent of Rs.245. 12*a*. to *Rankoo Singh* and *Bhyro Singh* by Captain *James Brown*, who must be assumed now to have had power to make the grant. A subsequent sunnud of *Kadir Ali*, who was the ancestor of the zemindar against whom the zemindary was sold for arrears of revenue, was also made in the year 1779 at the same rent. That grant was a ghatwali grant, and it was made more than twelve years prior to the permanent settlement. The question is, whether the zemindar, by dispensing with the ghatwali services, has a right to recover possession of the lands? It was held in the case of the same Rajah, *Leelanund Singh* v. *The Government of Bengal* (1), that the Government was not entitled to resume this talook as police lands. That was upon the ground that the talook had been assessed to revenue, and was a portion of the mal lands of the zemindary. But although the lands were not resumable, that is to say, although the Government could not re-assess the talook with revenue, it did not dispense with the services upon which the lands were held at the time of the permanent settlement. The lands therefore remained liable to the ghatwali services.

It is contended that the sunnuds, in effect, merely gave certain lands as wages to hired servants, and that the zemindar, whenever he chose, provided the Government dispensed with the ghatwali services, might put an end to the tenure and take back the lands, which were allotted in lieu of wages. It appears to their Lordships that that contention is not a correct one; that these sunnuds were grants of the land subject to certain services, namely, the service of paying a small rent of Rs.245. 12*a*., and also of performing the ghatwali duties. They were not therefore the

(1) 6 Moore's Ind. Ap. Ca. 101.

hiring of a servant, giving him certain land by way of wages, but grants of land upon the condition of certain services.

A similar case was argued in the High Court—*Kooldeep Narain Singh* v. *Mahadev Singh* (1). It was there held that, "Where a ghatwali tenure was granted more than 100 years ago, under a valid sunnud from a person representing the then Government, and had been allowed during that period to change hands by descent or purchase without question, the zemindar was incompetent, of his mere motion, without the assent and against the will of the Government, to put an end to the ghatwali services, to deprive the ghatwals of their lands, and to treat them as trespassers."

It is unnecessary to go particularly into the reasons for that decision. They are very fully pointed out in the decision itself, and that decision was, on the 18th of July, 1871, affirmed upon appeal by the Judicial Committee, who also gave their reasons for affirming the decision (2).

It may therefore be assumed upon the principle of those decisions, that the zemindar had no right to turn the tenants out of possession by dispensing with their services unless the Government had dispensed with those services, as between the Government and the zemindar. The only question then is, whether the fact of the Government's having consented to dispense with those services as regards the zemindar, and the zemindar's having agreed with the Government to pay an additional revenue of Rs.10,000 in consideration of the Government having absolved them from the services, makes such a distinction in this case that the zemindar, as between him and the ghatwals, is entitled to treat them as trespassers, and turn them out of possession. In the cases which have been cited it was stated that even if the Government had not dispensed with the services it appeared to their Lordships that the zemindar would have had no right to treat the ghatwali holders as trespassers, and their Lordships see no distinction between those cases and the present. The lands were held upon a grant, subject to certain services, and as long as the holders of those grants were willing and able to perform the services the zemindar had no right to put an end to the tenure, whether the services were required or not.

(1) 6 Suth. W. R. 199. (2) 14 Moore's Ind. Ap. Ca. 247; 11 Beng. L. R. 71.

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Some documents were referred to from which it appeared that certain ghatwals had been dismissed by the zemindar, but it does not appear that that was merely because the zemindar did not require their services. They may have been dismissed for incompetence or because they did not properly perform the services to which their tenures were subject. In such a case they might be dismissed, but the zemindar has no right to put an end to the tenure so long as the holders of the tenure were willing and able to perform the services.

The words "mokurruree istemraree" are used, and although it may be doubtful whether they mean permanent during the life of the person to whom they were granted or permanent as regards hereditary descent, their Lordships are of opinion that, coupling those words with the usage, the tenures were hereditary.

Under these circumstances, it appears to their Lordships that the decision of the High Court was correct, and they will humbly advise Her Majesty to affirm the decision, with costs.

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RAJAH LEELANUND SINGH AND OTHERS *v.* MUNOORUNJUN SINGH AND ANOTHER.

In this case the Plaintiff seeks to recover possession of certain lands, and not merely to enhance the rent of those lands. It appears to their Lordships that there is no distinction between this case and the case which has just been determined, except that in this case the sunnud was not granted prior to the date of the permanent settlement, whereas in the former case it was granted prior to that settlement.

In this case the sunnud which was produced was dated in 1794, and was subsequent to the date of the permanent settlement. But it appears to their Lordships, looking to the terms of the sunnud, that it was not an original sunnud, but that it treated the lands included in it as old ghatwali lands. It is unnecessary, however, to determine whether the tenure was created by that sunnud of 1794, or existed from an earlier date, for, whether it was created in 1794 or not, it appears to their Lordships that the Plaintiff is not entitled to maintain this suit, and to turn the Defendant out of possession. Upon the principle of the case just decided, the Plain-

tiff is not entitled to turn the Defendant out of possession upon the ground that he has dispensed with the services. He is not entitled as a purchaser at a sale for arrears of revenue to turn the Defendant out of possession upon the ground that the grant under which the Defendant claimed was created subsequently to the time of the permanent settlement. At the date of the purchase at the sale for arrears of revenue Act XI. of 1822 was the law which governed such sales; but that regulation had been repealed before this suit was commenced, and, unless the regulation of 1793 is still in existence, there is no law which would entitle the Plaintiff to avail himself of the fact of his being a purchaser at an auction sale. Their Lordships had some doubt in the case which has been cited of *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy* (1), whether the regulation of 1793 was in existence or not; but they held that, assuming it to be still in force, it did not authorize a purchaser at a sale for arrears of Government revenue to treat the pottahs mentioned in section 5 of that regulation as absolutely void for the purpose of turning the holder out of possession, but that the purchaser was only entitled to enhance the rent. That section enacted: "Whenever the whole or a portion of the lands of any zemindar, independent talookdar, or other actual proprietor of land shall be disposed of at a public sale for the discharge of arrears of the public assessment, all engagements which such proprietor shall have contracted with dependent talookdars, whose talooks may be situated in the lands sold, as also all leases to under-farmers and pottahs to ryots for the cultivation of the whole or any part of such lands (with the exception of the engagements, pottahs, and leases specified in sections 7 and 8) shall stand cancelled from the day of sale, and the purchaser or purchasers of the lands shall be at liberty to collect from such dependent talookdars, and from the ryots or cultivators of the lands let in farm, and the lands not farmed whatever the former proprietor would have been entitled to demand according to the established usages and rights of the pergunnah or district in which such lands may be situated, had the engagements so cancelled never existed." In the case to which I have just referred their Lordships held that the meaning of the words "shall stand cancelled from the day of sale," was not

(1) 10 Moore's Ind. Ap. Ca. 123.

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that they should be absolutely cancelled for the purpose of enabling the purchaser to recover possession of the lands, but that they were to stand cancelled from the day of sale so far as to enable the purchaser to exercise the power given of enhancing the rent to the pergunnah rates. Therefore, assuming that the ghatwali tenure in question was created subsequently to the date of the permanent settlement, namely, in the year 1794, their Lordships are of opinion that the Plaintiff would not as an auction purchaser be entitled to turn the Defendant out of possession, but that his only right, if any, would be to enhance the rent. The decision in the case of *Ranee Surnomoyee* v. *Sutteeschunder Roy* (1) was upheld in the case of the *Maharajah Suttosurrun Ghosal* v. *Moheshchunder Mitter and others* (2).

Their Lordships are of opinion that in any view of this case, the Plaintiff is not entitled to maintain this suit and to turn the Defendant out of possession. Their Lordships express no opinion as to whether the Plaintiff would be entitled to enhance the rent. Whether the circumstances of the case would enable him to enhance the rent, or whether a suit to enhance would be barred by the *Statute of Limitations*, are questions which are not at present before their Lordships, and as to which they wish to express no opinion.

Under these circumstances their Lordships will humbly recommend Her Majesty to affirm the decision of the High Court, and to dismiss the appeal, with costs.

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THAKOOR MUNOORUNJUN SINGH AND ANOTHER *v.* RAJAH LEELANUND SINGH AND ANOTHER.

In this case *Thakoor Munorunjun Singh* and *Tekaet Lokenauth Singh* are the Appellants, and *Rajah Leelanund Singh* and the Government are the Respondents. The appeal is from a judgment of the High Court, acting as Special Commissioners, dated the 25th of August, 1868.

The case, as stated by the Judges in delivering their decision, arises out of the proceedings of Government to resume certain ghatwalee lands in *Khuruckpore*.

(1) 10 Moore's Ind. Ap. Ca. 123. (2) 12 Moore's Ind. Ap. Ca. 263.

They say:—"On the appeal of *Rajah Leelanund Singh* and the Government, Her Majesty, in a council held on the 25th of July, 1855, held that the ghatwalee lands in the zemindary of *Khuruckpore* were not liable to resumption and reassessment under the provisions of clause 4, section 8, regulation 1 of 1793, which related to simple police establishments, and they set aside the resumption and gave a decree for mesne profits in favour of the Rajah, Appellant. The mesne profits which Government had to refund consisted of the rent or revenue paid by the ghatwals, whose lands were resumed, and with whom a settlement had been made at half jumma, which settlement was in force so long as the resumption decrees were not set aside. On the strength of the decrees which he had obtained in the Privy Council in July, 1855, *Rajah Leelanund Singh* applied for a review of judgment in all the other cases in which ghatwalee lands in the zemindary of *Khuruckpore* had been resumed; and the review was admitted and a decree passed in 1860 by three Judges of the late Sudder Court, sitting as special commissioners, who reversed the order for resumption, but declined to determine the question as to mesne profits which had been realised by Government." From that judgment an appeal was presented by *Rajah Leelanund Singh* to Her Majesty in Council, and on the 4th of February, 1864, the Judicial Committee held that, "The Judges who made the decree of 1860 ought not, in their Lordships' view of the matter, to have been silent as to the title to the money, but ought to have declared and acted on it, if able to do so, from the materials and parties before them, and if not so able to have directed an inquiry to ascertain the person or persons entitled." Upon that the case was remitted to the High Court, and the decision now under appeal was passed by the learned Judges. They held that, according to the theory of the ghatwalee tenures, the lands were assigned to the ghatwalees for maintenance in return for and in payment of police duties performed by them. The profits of the ghatwalee lands, they said, might therefore be said to represent the wages which, if paid in money, would have been paid to the ghatwals for their services; and they proceeded to say that it appeared to them that the ghatwals had, on the half rates which they pocketed during the existence of the settlement, been amply compensated for any loss which they had sustained ("though they

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did not appear to have sustained any") during the period when, owing to particular circumstances, they did not and could not perform their police duties. They said, "It has been suggested to us that the value of the services of the ghatwals might be computed by ascertaining the numerical strength of each post and assigning to the sirdar and each of the ghatwals a salary suitable to the position; but, on the view we have taken above, such computation appears to be unnecessary, for if we are correct in looking upon the whole profits of the ghatwalee lands as equivalent to the wages which the ghatwals would otherwise have received, it is apparent that when they did no service and retained one half of the profits for their own benefit they cannot claim the other half paid by them to Government in the shape of revenue." They said, "The whole of the money paid by the ghatwals to the Government in the shape of revenue should be paid over to the zemindar *Rajah Leelanund Singh*, partly as the quitrent due to him, and the remainder as compensation for the loss of the services of the ghatwals during the period the settlement with the ghatwals continued in force. The sums to be refunded will, as provided for by the decree of the Privy Council, carry interest to the date of liquidation."

Now, the status of the ghatwals has been determined in the cases which were before their Lordships yesterday, and it was then held that the ghatwals held the lands in question upon a tenure, by which they were liable to a certain rent and also to certain ghatwalee services, and that, notwithstanding the arrangement which had been come to between the zemindar and the Government, by which the Government had increased the revenue of the zemindary to the extent of Rs.10,000 a year, in consideration of the dispensation by Government of the services, the ghatwals were still entitled to hold their lands upon the tenure upon which they had been granted, and were entitled to hold the land and to receive the rents and profits thereof, paying to the zemindar the rent reserved upon the tenure.

Now, applying that principle to the present case, it appears that when the Government received half of the profits of the land for revenue, and left only one half the profits of the land in the receipt of the ghatwals, the Government were receiving a portion of the profits of the land which ought to have gone to

the ghatwals. They were receiving also a portion of the profits of the land which ought to have gone to the zemindar: in other words, the Government were bound to return the one half of the profits of the land which they received as revenue, by paying to the zemindar the rent which was due to him under the tenure, and returning to the ghatwals the remainder of the money.

Under these circumstances, their Lordships are of opinion that the judgment and decree of the High Court should be varied, and they will humbly recommend to Her Majesty that the judgment and decree of the High Court, acting as Special Commissioners, be varied, and that it be decreed,—That out of the moneys received by the Government of *Bengal* in respect of the lands included in the tenure of the Appellants the zemindar do receive the amount of the money rent payable under the ghatwali tenure during the period in respect of which the moneys in the hands of the Government were received as revenue, that the remainder be paid to the Appellants, and that the case be remitted to the High Court as Special Commissioners, who are, if necessary, to determine the amounts to be repaid to the parties respectively, according to the principle above laid down, the moneys so to be paid to carry interest as directed by the lower Court.

Looking to all the circumstances of the case, their Lordships will humbly recommend to Her Majesty that each party be directed to pay his own costs incurred in *India* subsequently to the Order of Her Majesty in Council of the 1st of March, 1864, that is the date of the Order in Council which was passed in pursuance of the decision of the Judicial Committee of February, 1864. It does not appear at present—for we have not the decree of the High Court before us—whether the High Court awarded any and what costs by that decree; but if any costs have been paid by either party under the decree now under appeal such costs are to be refunded, and each party will bear his own costs of this appeal. In regard to the Government, their Lordships think that the Government ought to bear its own costs of this appeal.

Agent for the Rajah and others: *T. L. Wilson.*
Agents for *Munoorunjun Singh* and another: *Barrow & Barton.*
Agents for the Government: *Lawford & Waterhouse.*

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March 20.

NEWAB MULKA JEHAN SAHIBA AND OTHERS . . . . . } PLAINTIFFS;

AND

MAHOMED USHKURREE KHAN AND ANOTHER . . . . . } DEFENDANTS.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Mahomedan Law—Sheeahs—Marriage—Assent of the Wife after Puberty—Inheritance.

A ceremony of marriage was performed between Mahomedan minors in the Fazolee (nominal) form; the girl's father being dead and the marriage being contracted by her paternal grandmother. Thereafter the girl died, having attained the age of puberty, without ever meeting or communicating with her husband, and without ever expressing in any way assent to or dissent from the marriage:—

Held, that by the law of the Sheeah sect which governed the case, the marriage, since the assent of the girl after attaining puberty was not shewn, was imperfect from the want of the necessary ratification, and could not create any rights or obligations.

Though by the law of the Soonnees the option of dissent must be declared by the girl as soon as puberty is developed; yet by the doctrine of the Sheeahs the matter ought to be propounded to her so that she may advisedly give or withhold her assent.

Held, further, that under such circumstances the paternal grandmother of the girl was not entitled to inherit her estate; that the mother as her surviving parent was entitled to a third share thereof, and that the Appellants her half-brothers and sisters were entitled (without prejudice to any claims by third parties) to the residue.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (January 29, 1869), affirming a decree of the Civil Court of *Lucknow* (July 31, 1868), made in a suit instituted by the Appellants for the purpose of establishing their right to inherit the estate of *Sooltan Ara Begum*, deceased.

The facts of the case appear in their Lordships' judgment.

Sir *R. Palmer*, Q.C., and *Cave*, for the Appellants.

The Respondents did not appear.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER. ASSESSOR: SIR LAWRENCE PEEL.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH :—

This was a suit brought by the Appellants in the Civil Court of the Judge of *Lucknow* under section 15 of Act VIII., 1859, to obtain a declaration of their right to inherit the property of *Sooltan Ara Begum* deceased.

The Appellants are members of the Royal Family of *Oudh; Newab Mulka Jehan* is the grandmother, and the other Appellants are the half brothers and sisters of *Sooltan Ara Begum;* her father was the late *Humayoon Bukht*, son of *Mahomed Ally Shah*, late King of *Oudh*, and *Newab Mulka Jehan*; and her mother is the Respondent, *Pearee Khanum.*

The Respondent *Ushkurree Khan*, claiming to be the husband of *Sooltan Ara Begum*, and her mother *Pearee Khanum* opposed the Appellants' claim. The Civil Judge dismissed the suit, and his judgment has been affirmed by the officiating Judicial Commissioner.

The questions are, first, whether the marriage of *Ara Begum* with the first Respondent was perfect at her death so as to confer a right on him, as her husband, to inherit; and second, whether her mother, *Pearee Khanum*, is entitled to a share of her property.

The ceremony of a marriage between *Ara Begum* and *Ushkurree Khan* was performed on the 16th of October, 1859, in the Fazolee (translated, nominal) form. Both were then minors, and were so treated; there is evidence that she was eight years and some months old; he about nine. *Ara Begum's* father was then dead, and the marriage was contracted by *Mulka Jehan*, her grandmother. It was celebrated with great pomp in the presence of the grandmother and the relatives of the girl. *Pearee Khanum* (the mother) says, "I was associated in the marriage; I was not directly consulted, but I was quite agreeable." Soon after the marriage *Mulka Jehan* took *Ara Begum* to *Arabia* to visit the holy places, and the girl died there without, as far as it appears, having met or communicated with her husband since the marriage. There is a discrepancy in the evidence as to her age when she died; the Appellants asserting she was eleven years of age only, her mother that she was thirteen. It seems probable, from the evidence, that

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she was nearer the former age than the latter; but it is not material, since according to the evidence of the High Priests in the absence of evidence to the contrary the presumption of the Mahomedan law is that a girl attains puberty when she reaches the age of nine years. In this case then, it may be taken, there being no evidence to the contrary, that *Ara Begum* had attained the age of puberty before her death; but there is no evidence that, after attaining it, the subject of the marriage was ever presented to her, or that she expressed in any way assent to or dissent from it.

The first question arising on these facts is, whether the marriage was inchoate only and in suspense, until ratified by the assent of the girl on her reaching the age of puberty, or whether it was complete and valid, unless dissented from and rejected by her on her attaining that age; and upon the decision of it, the rights of the parties depend. If the latter be the law, as the girl died without any expression of dissent, the marriage cannot now be avoided, whereas if the former be the true doctrine, the marriage, unless ratified (which will be hereafter discussed) remains imperfect, and can confer no rights. The determination of the question must be governed by Mahomedan law and the doctrines of the *Sheeah* sect, to which the Royal Family of *Oudh* and the husband's family belonged.

Authorities were cited to shew that the two great Mahomedan sects differ on the point upon which the case hinges. It is said that the Soonnees hold marriages like the present to be voidable only, *i.e.*, complete unless avoided by dissent; the Sheeahs, on the other hand, that they are Fazolee only, and incomplete until ratified by assent. And there certainly seems to be ground for the opinion that this distinction exists, and that the latter is the doctrine of the Sheeahs.

The evidence of the High Priests of *Lucknow*, given in the suit, appears to be clear upon the point, and upon the rights of the parties in cases like the present. They declare the law to be that the marriage of a minor contracted by the father or grandfather is binding and irrevocable, they having the legal right to contract for the minor; but that this irrevocable power of contract does not belong to guardians of a lower degree, as the mother or

grandmother, who can only contract a Fazolee marriage, that is, one incomplete for want of sufficient authority. They declare that, according to the Sheeah doctrine, a Fazolee marriage requires the assent of the minor, after attaining puberty and mature understanding, to perfect it, and that, in the event of death intervening before such assent is given, the marriage remains incomplete.

It was proved that, in accordance with the law thus laid down, the ceremony of the marriage in this case was in the Fazolee form.

In *Wilson's* Glossary the word "Fazuli" is thus defined: "In Mahomedan law, an unaccredited agent, one who acts for another without authority, and whose transactions are invalid unless confirmed by the principal." The word appears also from the Glossary to be used as an adjective, to denote contracts requiring such confirmation.

Their Lordships see no reason to disparage the learning or fairness of the High Priests who were examined upon the law, and they have observed with regret the strong animadversions made by the officiating Judicial Commissioner upon their evidence, which, in so far as it states the law, appears to be in accordance with the written authorities.

Part II. of Mr. *Baillie's* Digest of Mahomedan Law (as stated by the author in the introduction), is intended to exhibit the doctrines of the Sheeah sect, and to be composed entirely of translations from the Sharaya-ool-Islam, a work, he says, of the highest authority in that sect.

The following are extracts from chap. i. sect. 2, p. 9:—

"The contract of marriage may, according to the most approved doctrine, remain in suspense, as already mentioned, for the sanction of the person having authority in the matter; and if a young girl is contracted in marriage by any other person than her father or paternal grandfather, whether the person be nearly or remotely related to her, the contract cannot pass or be operative, unless subsequently allowed or approved by herself, even though the person were her brother or paternal uncle. In the case of a virgin this permission or assent may be inferred from her silence when the matter is propounded to her; but a woman who is not a

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virgin must be put to the trouble of giving expression by actual speech to her permission or assent."

Ibid., p. 10. "When the fathers of two young children have contracted them to each other in marriage, the contract is binding on them both; and if one of them should happen to die, the other would be entitled to share in the deceased's inheritance. If any other than the fathers of the children should contract them in marriage, and one of them should happen to die before arriving at puberty, the contract would be void, and both dower and the right of inheritance would fail."

Another passage states the law still more distinctly: chap. iv. p. 294. "When a girl under puberty has been married by her father or paternal grandfather, her husband inherits from her, and she from him. So also, if two young children are married to each other by their fathers or paternal grandfathers, they have mutual rights of inheritance. But if they should be contracted in marriage by any other than their fathers or paternal grandfathers, the contract remains in suspense till assented to by the spouses themselves, after arriving at puberty and discretion; and if one of them should die before such assent has been given, the contract would be void, and there would be no right of inheritance. And the same would be the result though one of them should attain to puberty and assent to the marriage, if the other should die before puberty."

The extracts cited in the judgments below from the works of *Macnaghten* and *Baillie* relate, as their Lordships understand, to the doctrine of the Soonnees. These, and still more distinctly some passages in the Hedaya, certainly seem to indicate that by that Law, a marriage between minors of the kind now in question requires dissent to annul it; and that in the event of one of the minors dying, the marriage remains in force, and the incidents of inheritance and of dower attach, as upon a marriage between persons of full age: Hedaya, book ii. chap. ii. vol. i. pp. 102–6.

It is not, however, necessary to decide what would be the rights of the parties according to the Soonnee Law; but their Lordships are led, by the evidence of the High Priests and the authorities above cited, to the conclusion that, by the law of the Sheeah school, the present marriage, unless the assent of the girl after

attaining puberty can be shewn, was imperfect, and could, if she died before such assent, create no rights or obligations.

It must, therefore, be ascertained whether such assent has been shewn, or ought to be presumed.

It seems to be clear, according to the Sheeah doctrine, that the girl must have arrived at puberty, and also be of mature understanding when her assent is given. There is no evidence of the state of *Ara Begum's* understanding, but assuming her to have been by age and understanding capable of assenting, their Lordships think there is not sufficient evidence of the fact of her assent to satisfy the requirement of the law.

The law of the Soonnees appears to adopt a very stringent rule requiring the option of dissent to be declared by the girl as soon as puberty is developed. But the doctrine of the Sheeahs seems to be that the matter ought to be propounded to her, so that she may advisedly give or withhold her assent. This is a rational provision of law, for assent ought to be the expression of the mind and will of the girl upon the marriage when it is brought to her notice, and is present to her understanding.

It appears by the extracts from *Baillie*, Part II., before cited, that the girl's assent, if a virgin, may be inferred from her silence when the matter is propounded to her; but a woman who is not must be put to the trouble of giving expression by actual speech to her assent. The mention of this distinction (which involves a concession to the modesty of a virgin) strongly indicates the view of the Sheeah school that assent must be evidenced in such a way as to leave no doubt that it is the act of the mind and will. Their Lordships, however, do not mean to hold that it must, in all cases, be shewn that the question of the marriage was distinctly propounded to the girl. They have no doubt that assent may, in some cases, be presumed from the conduct and demeanour of the parties after they have attained puberty and mature understanding. Circumstances may obviously exist which would properly lead to the inference that the marriage had been recognised and ratified, although no distinct assent could be proved. But in this case there is neither evidence of express assent nor of facts from which it may be presumed. The girl was taken to *Arabia*, far from her betrothed husband, and there is no proof that the marriage was

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ever brought to her attention, or that she by word or conduct in any way recognised or ratified it.

An attempt was made to prove a usage in the royal and noble families of *Oudh* that a girl married as a minor could not reject the marriage, although her guardians, who had assented to it, might be of a lower degree than her father or grandfather; but the evidence entirely failed to prove a usage having the force of law. The utmost that the Mahomedan gentlemen who were examined proved was, that it would be unusual and unbecoming for a girl to reject such a marriage. But the question is not what *Sooltan Ara Begum* would have done, as a matter of propriety, if she had lived, and the question had been propounded to her, but what by law she had the power to do, if she chose to exercise it. All these witnesses acknowledged that they must be governed by the law as expounded by the High Priests; and their evidence almost involved the assumption that the girl would have had a right by law to disaffirm the marriage, but that it would be unbecoming in her to avail herself of it.

For these reasons their Lordships, guided by what they conceive to be the doctrine of the Sheeah school, are of opinion that the evidence fails to shew that the Fazolee marriage had become perfect before *Ara Begum's* death, and consequently that the claim of *Ushkurree Khan* to inherit as her husband has not been established.

The Judges below rested their judgments principally upon passages cited from *Macnaghten* and *Baillie*, relating to Soonnee doctrines, and relied on these authorities in preference to that of the High Priests of the Sheeah school. This reliance, and their assumption that the Appellants had contended that the marriage was illegal, explain the grounds of their decision. But their Lordships do not understand that the Appellants so contended, or that the High Priests so declared the law. The marriage was perfectly legal as far as it went, but did not become effectual from the want of the necessary ratification.

It now becomes necessary to consider the claim made by *Pearee Khanum* as the mother of *Ara Begum*. It appears that she at first filed a petition in the suit, disclaiming any right in herself, and confessing the Appellants to be the heirs of her daughter, but

she afterwards withdrew it, asserting in another petition that the disclaimer had been wrongfully obtained from her, whilst living in *Mulka Jehan's* house, and that she was entitled to inherit a share of her daughter's property.

Their Lordships agree with the Judicial Commissioner that she ought to be allowed to withdraw her first petition. The Civil Judge, after deciding in favour of the validity of the marriage, dismissed (to use his words) "the suit to cancel the marriage," and referred *Pearee Khanum* to a separate suit to prove her rights. The Judicial Commissioner, in his judgment dismissing the appeal, stated that in his opinion the objection to the mother's claim arising from her being a slave could not prevail, as her slavery ceased on the annexation of *Oudh* by the British Government, and that any transfer of her legal rights of inheritance ought, by the Mahomedan law, to be made by gift or sale.

The Appellants appear to be the only parties interested in disputing the mother's claim. They have in fact brought this suit for the purpose of having their rights declared against her, as well as against the alleged husband; and it was their duty to have brought forward a complete case in support of the declaration of right they sought to obtain in their own favour, especially as the suit was directed to impeach two decisions of the Chief Commissioner, by which he had ordered a Waseekah pension of Rs.32. 11*a*. 8*p*. per mensem, granted to *Ara Begum*, to be paid to her and the husband. The Appellant, *Mulka Jehan*, had applied to reverse these orders, but the Commissioner refused to reconsider them, adding, that she might apply to the Civil Courts for a declaratory judgment. His words are:—"As to the two points she raises, 1st, as to the legality or otherwise of *Ushkurree Khan's* title; and, 2nd, as to the legality or otherwise of *Pearee Khanum's* title, she (*Mulka Jehan*) may prove her case in the Civil Courts; and should she obtain a declaratory judgment, she may apply for a reversal of former orders."

The objection made to the title of the mother to inherit is, that she was a slave of *Mulka Jehan*, when her daughter *Ara Begum* was begotten. Now, although this is asserted, there really is no evidence whatever of it in the record; and therefore the *status* of

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slavery which, it was contended, would by the Mahomedan law exclude her from inheriting, has not been in fact established.

It is not directly proved, and the circumstances rather repel than support the presumption, that this disqualifying *status* existed. It is admitted, on all hands, that *Ara Begum* was not treated as the spurious offspring of *Mirza Humayoon Bukht*, but as his lawful daughter, and as such entitled to inherit a share of his property.

This treatment of the daughter by the Appellants affords a strong presumption in favour of the right of her mother to inherit from her.

It appears to be clear Mahomedan law that, if a man has a child by his own slave, the child, without marriage, is deemed to be lawfully begotten, and is entitled to inherit as a co-sharer with children born in marriage—the mother in such case becoming oom-i-walad, and entitled to emancipation on the death of her master. These consequences however, according to some authorities, occur only in the case of a master having a child by his own slave, for it is said to be unlawful for a man to have connection with the slave of another, especially with his mother's slave, and that the parentage of a child born of such connection, although begotten in error, cannot be established to belong to him. (See *Macnaghten's* Precedents, Case VII., p. 322; *Hedaya*, vol. i. p. 384, vol. ii., p. 20.)

It should be observed that the authorities just cited are of the Soonnee school, and that there is some authority for the proposition that among the Sheeahs a child begotten of a slave-girl, of whom the true owner had parted with the usufruct to the father of the child, stands on the same footing as the child of a man by his own slave. (See *Baillie's* Imameea, pp. 53, 56.) But, however this may be, the Appellants have wholly failed to prove the *status* of *Pearee Khanum*, or that if she was the slave of *Mulka Jehan*, that the latter gave her over, for a time, to the embraces of her son. All that is proved with certainty is, that *Ara Begum* was treated as the legitimate child and one of the co-heirs of her father, and that *Pearee Khanum* is her mother, and therefore presumably entitled to inherit to her. The disinclination of the

Mahomedan law to bastardize children has sanctioned the presumption from slight evidence of marriage or lawful consort. (See *Macnaghten*, Preliminary Remarks, pp. 23, 24, cited with approval by this tribunal in *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1).) There is no doubt an absence of direct evidence in the present suit to support the presumption, but the admission of the legitimacy of the daughter by the Appellants, to be implied from their conduct, is amply sufficient, after the deaths of the child and her father, for the purpose, and stands in the place of proof against them. It is to be observed that there would be no insurmountable obstacle to such a presumption in this case, even if it had been proved that *Pearee Khanum* had been the slave of *Mulka Jehan*, for her mistress might have emancipated her for the purpose of making the relations between her son and the girl lawful. It is clear that *Mulka Jehan*, as the grandmother of *Ara Begum*, has in the strongest way recognised her as a legitimate child of her son. She was so brought up in the family, and the ceremony of her marriage with *Humayoon Bukht* was performed with much pomp and ceremony. After these acknowledgments, *Mulka Jehan* and the Appellants who act with her ought, in their Lordships' view, to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence they think the presumption must prevail.

The conclusion at which their Lordships have arrived makes it unnecessary to consider what would be the effect of the British Acts relating to slavery upon the capacity of *Pearee Khanum* to inherit from her daughter, if it had been proved that she was a slave at the time of her daughter's birth.

The result of their Lordships' opinion is that *Mulka Jehan* as grandmother is not entitled to inherit, and that *Pearee Khanum* is entitled, as the surviving parent, to a third share of her daughter's property (see *Baillie's* Imameea, book 7, c. 1, ss. 3, 4, pp. 272, 273; *Punjaub* Code, sec. 4, cl. 8, 9; *Macnaghten*, ch. 1, sec. 4, cl. 62), and the Appellants, the half brothers and sisters of the deceased, to the residue.

Their Lordships think that as between the Appellants and the

(1) 3 Moore's Ind. Ap. Ca. 316.

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NEWAB MULKA JEHAN SAHIBA v. MAHOMED USHKURREE KHAN.

first Respondent, they should each pay their own costs in the Courts below.

Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and that of the Civil Judge; and, in lieu thereof, to order that it be declared that the marriage of *Sooltan Ara Begum* with the first Respondent was imperfect and invalid, and that he is not entitled, as her husband, to a share of her estate, and that the Respondent *Pearee Khanum*, as mother of *Ara Begum*, is entitled to one-third share, and that the Appellants, other than *Mulka Jehan*, are entitled, so far as relates to any claims by the Respondents (but without prejudice to any other claims) to the residue, and further to order that *Pearee Khanum* is entitled to her costs in the Courts below from the Appellants, that the Appellants and the first Respondent should each pay their own costs in those Courts, and that any costs which may have been paid by the Appellants to the first Respondent be refunded by him.

There will be no order as to the costs of this appeal.

Agents for the Appellants: *Watkins & Lattey.*

RAJAH PIRTHEE SINGH . . . . . DEFENDANT ;

AND

RANEE RAJ KOWER . . . . . PLAINTIFF.

J. C.*
1873
March 28.

ON APPEAL FROM THE HIGH COURT AT NORTH-WESTERN PROVINCES.

Hindu Widow—Maintenance—Arrears—Not bound to reside with her Husband's Family.

A Hindu widow is not bound to reside with the relatives of her deceased husband; and she does not forfeit her right to property or maintenance merely on account of her going and residing with her family or leaving her husband's residence for any other cause than unchaste or improper purposes.

Arrears of maintenance may be awarded to a widow as well as a decree for future maintenance.

APPEAL from a decree of the High Court (May 4, 1870) (1) affirming a decree of the Subordinate Judge of *Agra* (Dec. 1869).

The facts of the case appear in the judgment of their Lordships.

Leith, Q.C., and *J. Arathoon*, for the Appellant.

Grady, for the Respondent.

The authorities cited in the arguments were Col. Dig. bk. v. v. 481; 1 Macn. H. L. p. 104; *Elberling*, s. 167; *Dayakrama* Sangraha, ch. 1, s. 2, v. 4; Sir *F. Macnaghten's* H. L. p. 62; *Cossinauth Bysack* v. *Hurroosoondary Dossee* (2); *Oma Debia* v. *Kishen Munee Debia* (3); *Sebeesoonderee Dosse* v. *Kistokissore Neoghy* (4); *Jadumanir Dossee* v. *Kheytramohun Shil* (5); *The Ramnad Case* (6); *Shurnomoyee Dosse* v. *Gopal Lall Dass* (7); *Venkopadhyaya* v. *Kavari Hengusu* (8).

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 2 Allahabad, H. C. R. 170.
(2) Morton's Rep. 85.
(3) 7 Sel. Rep. 270.
(4) 2 Tay. & Bell, 190.
(5) Shamachurn 384.
(6) 12 Moore's Ind. Ap. Ca. 397.
(7) Marshall, 497.
(8) 2 Madras H. L. R. 36.

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RAJAH PIRTHEE SINGH v. RANEE RAJ KOWER.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This was a suit brought by *Ranee Raj Kower* against Rajah *Pirthee Singh* to recover arrears of maintenance, and also to have a decree for future maintenance. Rajah *Pirthee Singh* was the adopted son of Rajah *Petumber Singh*, and the Plaintiff was the fourth or youngest of four widows left by the late Rajah. The subordinate Judge gave a decree in favour of the Plaintiff, which was appealed to the High Court, who supported that decision and increased the amount of maintenance awarded by it. From that decision there is an appeal to Her Majesty in Council which we now have to consider.

The defence set up by the adopted son was that the Plaintiff had been provided with maintenance so long as she lived with the family of her deceased husband, but that she had quitted his house for improper purposes. He says, "The Defendant provided the Plaintiff with maintenance so long as she remained in Ava" (that was the family house), "according to the family custom. In 1861 the Plaintiff, disregarding her husband's honour, left for *Kotah* with *Bhola Nath*, contrary to the terms of the will and the family custom, and became an abandoned character. This being so she has lost her right. Even after this the Defendant, to avoid scandal and to oblige her, and relying on her promise that she would no more let *Bhola Nath* have any access to her, allowed her lodgings at *Durriyapoor*, and regularly took care of her maintenance. The Plaintiff's claim for maintenance prior to the institution of the suit is therefore illegal, and her claim for interest is also illegal, the payment of which was never stipulated. The Plaintiff has nevertheless not parted with *Bhola Nath*, *i.e.*, she has continued to act and behave contrary to her promise, disregarding the honour and custom of the family, and has not left off her former bad habits. She has, therefore, no right under the Hindu law to have a maintenance fixed for her for the future." Now, that defence on the part of the Defendant has not been proved, and has been very properly given up. The Plaintiff alleged that some dispute arose between her and the elder widow with regard to her jewels which she did not make out; and she has not made out any cause for leaving the

residence of her late husband any more than the Defendant has made out his defence. The question, therefore, comes to this: whether a Hindu widow loses her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purposes of unchastity or for any other improper purpose.

Several cases have been cited upon this point, and it will be as well to refer in the first instance to a case which was decided by the Privy Council, as that is one of the highest authority. That was a suit by *Cossinauth Bysack and another* v. *Hurroosoondry Dossee and another* (1), which was tried in the Supreme Court in *Calcutta*, in which the Chief Justice, Sir *Edward Hyde East*, gave judgment. The question was put to the pundits, whether a widow was deprived of her property upon the ground of her having left her deceased husband's residence. Sir *Edward Hyde East* says: "Upon the last ground of error the pundits have uniformly answered that the widow was not bound to live with her husband's relatives. The eighth question put by the Court to their pundits was: 'If a widow from a just cause cease to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate?' *A.* 'If a widow for any other cause but for unchaste purposes cease to reside in her husband's family, and take up her abode in the family of her parents, her right would not be forfeited.'" He certainly goes on to say here there was a good cause at the time, namely, the extreme youth of the wife, and no pretence was made of the prohibited cause. It was alleged that, having left the residence of her deceased husband, and having refused to reside with the family, she did not forfeit the property which she had taken. That case was appealed to Her Majesty in Council, and was decided on the 24th of June, 1826. The opinion of the Judicial Committee was delivered by Lord *Gifford*. He says: "With respect to the last supposed ground of error in this decree which was assigned by the Appellants, namely, that it was not ordered by either of the decrees that *Hurroosoondry Dossee* should reside with or under the care, protection, and guardianship of the Appellants, who, as the surviving brothers of *Bissonauth Bysack*, were alone entitled to have the care, protection, and guardianship of his widow, the pundits appeared to be unanimous

(1) Morton's Rep. 85.

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in the opinion that a Hindu widow is not bound to live with her husband's relatives." That is the principle laid down. Then says his Lordship: "I will read the eighth answer to the eighth question put, which will explain what the Hindu law is upon the subject, and in that it appears the other pundits who were called in agreed, or at least they expressed no objection to the opinion pronounced. The question put is this: 'If a widow from a just cause ceases to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate?' The answer is, 'If a widow from any other than unchaste purposes ceases to reside in her husband's family, and takes up her abode in the family of her parents, her rights would not be forfeited.'" Then his Lordship goes on to say: "Now, it was not pretended in the case that she had removed from the protection of her husband's family for unchaste purposes. She was only of the age of fourteen years at the death of her husband. His brothers were young men, and she thought it more prudent and decorous to retire from their protection, and live with her mother and her family after the husband's death. Therefore it appears quite clear from the answers given by the pundits that she did not forfeit the right of succession to her husband's estate on account of removing from the brothers of her late husband; that they had no right to insist upon her not withdrawing from them in order to put herself under the protection of her mother, and therefore there appears to be no foundation to that extent for the appeal." The reasons given, that she was only of the age of fourteen years at the death of her husband and that his brothers were young men, do not appear to be the reasons upon which that decision was founded. It was merely pointed out, as their Lordships understand the judgment, for the purpose of shewing that the widow was not removing from her husband's house for unchaste or improper purposes.

It therefore appears that a Hindu widow is not bound to reside with the relatives of her husband; that the relatives of her husband have no right to compel her to live with them; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family or leaving her husband's residence from any other cause than unchaste or improper purposes.

That decision is quite in accordance with the Vyavastha which are quoted by *Shamachurn Sircar* in his book called Vyavastha Darpana. At p. 370 Vyavastha, Nos. 199 and 200 are thus stated: "Should a woman without unchaste purposes quit the family house, and live with her parents or other relations, she is still entitled to maintenance. The widow, however, is not entitled to maintenance by residing elsewhere without a just cause, if she was directed by her husband to be maintained in the family house." The husband in this case left a will, but he did not impose any condition upon either of his widows to reside in his family house after his death. He wrote a letter to the Collector, in which he stated that he did not wish that his widows should have the management of his property, and put the property into the hands of a mooktear, because, he said, it was of importance to maintain the reputation of his family. But it is no more than any other Hindu gentleman would desire, that after his death his property should not be jeopardized, that the reputation of his widows should be maintained, and that they should not destroy the reputation of his family by destroying the reputation of themselves.

It has been held that the Hindu law does not require a Hindu widow, for the purpose of maintaining her reputation, necessarily to live with her husband's relatives. She does not injure her reputation by living with her own mother or her own father. It is laid down as a rule of law that she is not bound to live with her husband's relatives. The decision of the Privy Council was quite in accordance with those texts of the Hindu law referred to by *Shamachurn Sircar*.

In the case of *Shibi-sundari Dasi*, the widow of *Golack-chander*, cited in *Baboo Shamachurn Sircar's* book at p. 381, in which Sir *Lawrence Peel* delivered a judgment, it appeared that *Shiba-sundari Dasi*, widow of one *Golack-chander*, who died during his father *Ram-mohan's* lifetime, voluntarily left the family house (voluntarily, that is to say, without any cause except her own will and desire), and sued the Defendants, who were the surviving sons and representatives of the other sons of *Ram-mohan*, for separate maintenance. A verbal reference had been made to three respectable Hindus, *Kashi-nath Mallik*, *Gobinda-chander Banarjea*, and *Ram-mohan Neoghi*, who awarded Rs.12 per month as a sufficient

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allowance to her, she being allowed apartments in the family house and food. Sir *Lawrence Peel* said: "We think she is entitled to a separate maintenance. The words 'food and raiment' being too vague and ambiguous an expression, we must refer it to the Master to inquire and report whether the amount offered was just and proper with reference to her situation in life." Then in another case, "*Srimati Mando dari Debi*, the eldest of the two widows of *Tilak-ram Pakrasi*, a Hindu native of *Bengal*, filed a bill against his son, praying that Defendant may set forth a full, true, and perfect account of the property, and may be compelled by a decree to pay her the same." I believe it was not made a question about her having left the father's house, but in that case arrears of maintenance were awarded to her and future maintenance secured.

There was also the case of *Jadu-manir Dasi* v. *Kheytra-mohan Shil*, reported at p. 384 of the same book, in which Sir *Lawrence Peel*, having considered the whole question, laid down the law in a clear and explicit manner. Every one who is acquainted with Sir *Lawrence Peel* must have the highest respect for his opinion upon all questions of this kind. He delivered the judgment of the Court. He said: "The question is whether a Hindu childless widow, who, some time after the death of her husband, uncompelled by cruelty or ill usage, left the house of the family of her deceased husband, to dwell at first in the house of her own father, and subsequently with her aunt, living with her own relations, the residence being in all respects a proper one and her conduct unimpeached, forfeits her right of maintenance out of the property which was that of her deceased husband in his lifetime, and which had devolved on his heirs." There the question was whether the principle which had been laid down in the case cited from the Privy Council, which was applicable to property inherited by a widow from her deceased husband, was applicable to a case of maintenance. Sir *Lawrence Peel*, after referring to some conflicting authorities, said, "This state of the authorities has induced us to examine closely into the law on the subject. We should not hesitate to follow the decisions of the Sudder in preference to those of our own Court, if they appeared to us to be at once more just and more conformable to the Hindu law. We have intended to

follow the Privy Council. The Privy Council has, on the subject of the right of the Hindu widow to return to the home of her parents, laid down a broad rule, upon which it is not desirable to infringe. That Court says, 'It was not pretended that she had withdrawn herself for unchaste purposes. She was only fourteen at the death of her husband, his brothers were young men; and she thought it more prudent and decorous to retire from their protection and live with her mother and her family after the husband's death, therefore it appears quite clear from the answers given by the pundits that she did not forfeit the right of succession to the husband's estate on account of removing from the brothers of her late husband; that they had no right to insist on her not withdrawing herself from them, in order to put herself under her mother's protection.' The decisions of that Court must of course give the law to all Courts here." The answer of the pundits, which the Privy Council adopts, is, "That if a widow, from any other cause than unchaste purposes, ceased to reside in her husband's family and takes up her abode in her parents' family, her rights are not forfeited." Then he says: "In the Privy Council the question was whether the Hindu heiress forfeited her estate by selecting without impropriety her father's roof for her residence. But it is to be observed that the opinion of the pundits was generally expressed as to forfeiture of rights, and the Court expressed in general terms that the widow had a right under the circumstances to select that residence, and could not be compelled to reside under the roof of her husband's family. This freedom of choice had respect to causes as applicable to a widow, not to an heiress, as to one who inherited," meaning to say, that the rule which has been laid down was equally applicable to a case of maintenance as it was to the case of property which the widow had inherited; that is to say, that she was entitled to a freedom of choice, and that unless she left the residence of her deceased husband for unchaste purposes, she could not be deprived either of the property which she had inherited from him, or be deprived of maintenance which the Hindu law requires the heirs of her husband to provide for her.

We are therefore not now deciding the question for the first time. We are not now for the first time laying down a rule upon

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this subject. In the case of *Shurno Moyee Dassee* v. *Gopal Lall Doss*, reported in the volume of *Marshall's* decisions in the High Court, page 497, the widow sued for maintenance, and it was held that she was entitled to that maintenance notwithstanding she had left the residence of her deceased husband. The Court said, "In this case a widow sues for maintenance. The Defendant, who is her stepson, objects that she resides in the house of her father, and alleges that she is therefore not entitled to maintenance. The widow alleges that she left the family home because she was tortured or rendered uncomfortable, but did not prove that allegation. We find, however, that it is laid down in the Vyavastha Darpana of *Shamachurn Sircar*, the learned interpreter of the late Supreme Court, vol. i., page 319, section 160, that 'should a woman without unchaste purposes quit the family house and live with her parents or own relations, yet still she is entitled to maintenance,' and in section 161 'The widow, however, is not entitled to maintenance by residing elsewhere without a cause if she was directed by her husband to be maintained in the family home.' We think therefore that the widow is entitled to retain the decree for maintenance which she has obtained, and dismiss the appeal."

In this case their Lordships are of opinion that there was no direction by the husband's will which rendered it necessary for the widow to reside in her husband's house. The case of a widow is very different from the case of a wife. A wife of course cannot leave her husband's house when she chooses, and require him to provide maintenance for her elsewhere; but the case of a widow is different. All that is required of her is that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance unless she is guilty of unchastity or other disreputable practices after she leaves that residence.

The case was tried by a subordinate Judge, in this instance, who was a Hindu, and therefore must be acquainted with the habits, usages, and religion of Hindus; and he thought that the widow having left the husband's house, was still entitled to her maintenance, and he awarded her the sum of Rs.150 a month, with a sum of money calculated at that rate for the years during

which she had not been allowed maintenance. The case was appealed to the High Court, and that Court thought that, having regard to the amount of the husband's property the widow was entitled to a larger sum; and they awarded her maintenance at the rate of Rs.200 a month. Their Lordships do not think it necessary to disturb that decision. The amount of maintenance it is stated in the Vyavastha 197 in *Shamachurn Sircar's* book should be fixed with reference to the proprietor's estate. Now in this case the deceased husband left property to the extent of two lacs, or £20,000 a year. It does not appear to their Lordships to be excessive, even though he left four widows, that each of those widows should have at the rate of Rs.200 a month, equal to £240 a year. Looking to the state in which a widow is bound to live and the religious duties which she is called upon to perform, it does not appear to their Lordships, having reference to the property of the deceased husband, that this widow ought to receive a less sum than that which has been awarded to her by the High Court, namely, Rs.200 a month.

Some question was made as to the right of the widow to recover past arrears. A case was cited from the *Madras* High Court (1) in which arrears were awarded; in the case also in which Sir *Lawrence Peel* gave that elaborate judgment to which I have referred, arrears of maintenance were awarded to the widow as well as a decree in her favour with regard to future payments.

Under these circumstances their Lordships are of opinion that the decision of the High Court is correct, and they will therefore humbly recommend Her Majesty that that decree be affirmed, with the costs of this appeal.

Agent for the Appellant: *T. L. Wilson.*
Agents for the Respondent: *F. Richardson & Sadler.*

(1) 2 Madras, H. C. R. 36.

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SOORJOMONEE DAYEE . . . . . DEFENDANT;

AND

SUDDANUND MOHAPATTER . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Res Judicata—Effect of Decree—Act VIII. of 1859, *sect.* 2—*Cause of Action.*

In a suit by a testator's adopted son and heir-at-law to obtain possession of the whole estate of the deceased, on the ground that both the inherited property and the property acquired from the income thereof were ancestral, and could not under the Mitakshara be disposed of by will, it was pleaded that it had been decided in a former suit between the same parties that the testator had the power to devise by will such real property as he had acquired out of the income of his ancestral property.

It appeared that in that former suit the Plaintiff sought to cancel various alienations by the testator; that the effect of the pleadings and of the memorandum of appeal therein was to put in issue *inter alia* whether the testator had power to make any of the devises of realty contained in the will; but that the only issue actually raised relating to the will was whether or not it had been assented to by the Plaintiff:—

Held, that notwithstanding that the said issue embraced but a portion of the controversy between the parties, inasmuch as it plainly appeared that the question of the validity of the whole will was raised by the parties and submitted to the Court as above stated, the judgment thereon was binding.

The term "cause of action" in sect. 2 of Act VIII. of 1859, is to be construed with reference rather to the substance than to the form of action.

Sect. 2 does not prevent the operation of the general law relating to *res judicata*, which is, that when a question has been necessarily decided in effect, though not in express terms, between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form.

Gregory v. *Molesworth* (1) approved.

APPEAL from a decree of the High Court (May 5, 1869), varying a decree of the Principal Sudder Ameen of *Cuttack* (April 27, 1864).

The facts of the case appear in their Lordships' judgment.

Leith, Q.C., and *Cochrane*, for the Appellant.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

(1) 3 Atk. 626.

Doyne, and *Cutler*, for the Respondent.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This suit was brought by *Suddanund Mohapatter*, as adopted son and heir-at-law of *Chuckurdhur*, against *Soorjomonee Dayee*, the widow of *Bonomalee*, the devisee of *Chuckurdhur*, to obtain possession of all the estate, real and personal, of *Chuckurdhur*. Other Defendants were joined, but inasmuch as *Soorjomonee* is the only Appellant against the judgment, which was in favour of the Plaintiff, the rights of the Plaintiff as against *Bonomalee* have only to be considered. The claim to the personal property was abandoned by the Plaintiff, nor did he dispute that *Chuckurdhur* had the right to dispose by will of all real property which had been self-acquired by him; but he asserted that there was no self-acquired real property, that all the real property of *Chuckurdhur* was either ancestral in the strict sense of the word (that is, acquired by inheritance from his father), or bought out of the income of ancestral property, whereupon it also became ancestral. The Defendant did not maintain that *Chuckurdhur* could devise his ancestral property, properly so called, but maintained that what he had bought from the income of ancestral property was, according to the Mitakshara law (which is admittedly applicable to this case), self-acquired, and disposable by his will.

She further maintained that this very question had been decided in favour of *Bonomalee* in a previous suit between the Plaintiff and him. She also contended that in fact a large portion of the property had been bought by *Chuckurdhur* from other sources than the income of ancestral property.

The High Court held that this question had not been so determined as to bind the Plaintiff. After directing further evidence to be taken upon the point, they found as a fact that the real property bought by *Chuckurdhur* had been bought from the income of ancestral property; and, that being so, they ruled that, according to the Mitakshara law, he had no power to dispose of it by will.

The first question which arises in the cause is, whether or not

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it had been decided in a manner binding upon the parties, that *Chuckurdhur* had the power to devise by will such real property as he had acquired out of the income of his ancestral property.

The suit in which this question is alleged by the Defendant to have been so decided was brought by the Plaintiff against *Bonomalee* and others in January, 1859, and judgment was given in it in 1863. It is not now denied by the counsel for the Respondent that this question was in fact decided by that judgment; but it is argued that the question was not so raised as to give the Court jurisdiction to decide it, and that the judgment upon it was *ultrà vires.*

The facts necessary to make that suit intelligible are as follows:—

Chuckurdhur had first adopted the Plaintiff, and subsequently adopted *Bonomalee.* On the 5th of April, 1849, he made a will, giving a nine-annas share of his real estate to the Plaintiff, and a seven-annas share to *Bonomalee,* dividing his personal estate equally between them. The will contained a clause to the effect that if either devisee disputed it, he should forfeit all benefit under it. *Chuckurdhur* shortly afterwards published this will by filing it in the Court of the Collector.

Violent disputes having arisen between the Plaintiff and his father, in the course of which the Plaintiff disputed his father's competence to make a will, *Chuckurdhur,* in 1857, filed in the same Court two petitions, the purport of which was that he disowned the Plaintiff as his son, and adopted, and acted upon, the clause of the will depriving either devisee who disputed it of any benefit under it. On the 14th of January, 1859, the Plaintiff filed a plaint against his father and against *Bonomalee* and some other persons who had obtained property under deeds executed by his father, for cancellation of those deeds, for cancellation of the adoption of *Bonomalee,* for cancellation of the will, and for maintenance. He alleged the will to be inoperative and fraudulent, on the ground that his father had no testamentary power over his ancestral property, to which the Plaintiff was jointly entitled with him during his life; he further alleged that his father had acquired such property as he had not inherited from the proceeds of his ancestral property, and that such property was therefore

ancestral; and in a schedule appended to his plaint, entitled, "A schedule of the disputed property," he distinguished ancestral zemindaries from zemindaries acquired from the profits of ancestral estate.

The case of *Kanth Narain Singh* v. *Prem Lal Paurey and Others*, reported in the third volume of the *Weekly Reporter*, p. 201, decides that it was competent for the Plaintiff to bring such suit in his father's lifetime.

Chuckurdhur, in his answer, maintained his right of disposition by will in these terms: "The Plaintiff writes that I had no authority to transfer ancestral estates by sale or gift, and prays for the reversal of the will and the deeds of gift executed by me. This is his mistake, because I am the owner of all the estates, ancestral and self-acquired, and have every power to alienate them by sale or gift in various ways." He further denied the fact that his purchases of land were made solely from profits of the ancestral estate. In the replication the Plaintiff re-asserted his right of inheritance, and maintained that in that right he was entitled to require, among other things, the cancellation of the will.

He re-asserted that all the estates of his father were ancestral estates, and none self-acquired according to Hindu law, and that by that law they are not transferable by sale or gift or otherwise; and joined issue on the fact that the purchased estates were acquired otherwise than from the proceeds of ancestral estate.

In their Lordships' opinion, the effect of the pleadings is that the Plaintiff sought, *inter alia*, to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained, inasmuch as he could not devise ancestral real property, and all his real property was in point of law ancestral, consisting of such as he had inherited from his father, and such as he had bought out of the income of it.

It is true that this question is not raised as distinctly as it ought to have been in the issues, the only issue directly referring to the will being whether or not it was assented to by the Plaintiff, an issue clearly embracing but a portion of the controversy between the parties.

That the question was, however, raised in the suit, appears not only by the pleadings which have been referred to, but by the

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grounds of appeal by the Plaintiff from the decision of the Principal Sudder Ameen, which was against him, wherein he insists (among other things) that the will is wholly irregular and illegal, and that the Defendant had no power under the Shastres to execute such a will or wills. He says, "All the properties moveable and immoveable are ancestral, and not the self-acquired properties of my adopted father; therefore, according to the provisions of the Mitakshara shastre, gifts of even a portion without the consent of your Petitioner are illegal and improper." *Chuckurdhur*, in opposition to the grounds of appeal, insists that his will was valid and regular, and that he had the power to dispose by it of all property not ancestral in the proper sense.

If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with the case of *Mussamat Mitna* v. *Syud Fuzl Rub and Others* (1), wherein it was held that in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid.

Their Lordships are of opinion that the Plaintiff sought for the decision of the Court on this question, whether his father had or had not the power to dispose of all or part of his real property by will, he himself dividing that property under two heads, viz., ancestral property, and that derived from the income or profits of ancestral property, that this question was raised by the pleadings and treated by both parties as before the Court, and that the Court had jurisdiction, and indeed were called upon, to decide whether or not the will was operative as to all, or to any, or what portion of the property. The Principal Sudder Ameen decided in substance in favour of the Plaintiff as far as the ancestral property was concerned, but dismissed his suit as far as it related to the property derived from the income of ancestral property.

An appeal from this decision came before the High Court on

(1) 13 Moore's Ind. Ap. Ca. 573.

the 28th of February, 1863, after the death of *Chuckurdhur*, and it now becomes necessary to refer to the judgment given on that appeal. After stating that "the present suit is brought by *Suddanund* for maintenance, to declare the adoption of *Bonomalee* invalid and unlawful, to declare that the father's repudiation of the Plaintiff as a son is illegal and beyond the father's powers, to declare the will and petitions disinheriting him inofficious and inoperative, and to set aside certain deeds of sale and gift" (with which we are not concerned at present), the High Court proceed to say that the case involves several important questions of Hindu law, and they thus divide those questions: First, "the *status* of *Bonomalee*, whom the Plaintiff seeks to declare to be no lawful son of *Chuckurdhur*;" secondly, "the *status* of Plaintiff who seeks to be declared a son, and whom the father sought to repudiate;" and thirdly, "the property." After deciding in favour of the Plaintiff on the question of adoption and *status*, they then proceed to deal with the question of property in these terms:—"With respect to the property, our decision must follow the decisions regarding personal *status* above laid down. By the Mitakshura law applicable to the case, the son has a vested right of inheritance in the ancestral immoveable property; and as the question was raised before us, we must declare that the ancestral property is only that actually inherited, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property, for the income is the property of the tenant for life to do as he likes with it. On the other hand, the father has it in his power to dispose as he likes of all acquired and all personal property. Such, then, being the *status* of the parties, and such the law, we declare that the will and the petitions sought to be set aside are inofficious and inoperative so far as they profess to deprive the Plaintiff, the only son of *Chuckurdhur*, of his right to succeed to the whole ancestral immoveable property held by the said *Chuckurdhur;* but as regards all other property, seeing that *Chuckurdhur* was entitled to do as he chose, and chose to disinherit his son, we cannot interfere, and in so far dismiss the prayer of the Plaintiff. There is not the least doubt that by the petitions presented by *Chuckurdhur* he unmistakably published his will and desire to deprive

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the Plaintiff of all right to the property so far as he could deprive him, and give it to *Bonomalee*." They then deal with the question of consent to the will, which they find in favour of the Plaintiff; and then they proceed to say, "the father being dead, the Appellants have waived a decision of the claim to maintenance; and with respect to the deeds of sale and gift sought to be set aside, as the Appellants must again go into Court to recover possession of the ancestral property, they are satisfied with the simple declaration that such deeds cannot affect the ancestral property, and that they are at liberty in any fresh suit, to recover possession of all such ancestral property." In their Lordships' opinion the Court had the power to substitute, with the consent of the parties, such a declaration for the relief specifically asked for, viz., the cancellation of the will.

The 2nd clause of Act VIII. of the Code of Procedure of 1859 is in these terms: "The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim." Their Lordships are of opinion that the term "cause of action" is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle "*nemo debet bis vexari pro eâdem causâ*." This law has been laid down by a series of cases in this country with which the profession is familiar, and has probably never been better laid down than in a case which was referred to in the 3rd volume of *Atkyns* (*Gregory* v. *Molesworth*), in which Lord *Hardwicke* held that where a question was necessarily decided in effect though not in express terms between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the

very able notes of Mr. *Smith* to the case of the Duchess of *Kingston.*

Applying these principles of law to the present case, their Lordships are of opinion that there has been a binding decision between the Plaintiff and the Defendant, who, for this purpose, stands in the position of her late husband, that *Chuckurdhur's* will was operative to dispose of all such real property as he had acquired out of the income of ancestral property. Their Lordships agree with the High Court that *Chuckurdhur* did in fact devise the property over which he had the power of disposition to *Bonomalee;* and they regard the petitions of 1857 not as in the nature of new wills, but as declarations of his intention to act upon the clause of forfeiture in his will, a clause which, according to the case of *Cook* v. *Turner* (1), would be valid and operative.

Having come to this conclusion, their Lordships forbear from intimating any opinion on the points of law which would have arisen had their decision on this been different, on one of the most important of which the judgment of the 28th of February, 1863, and that which is now under appeal, are in conflict.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, and the decree of the Principal Sudder Ameen affirmed.

Considering that the complications which have arisen have been due in some measure to the manner in which *Chuckurdhur* himself dealt with his property, and that the Courts below, both that of the Principal Sudder Ameen and the High Court, thought this a case in which each party ought to bear his own costs, their Lordships are of opinion that each party should bear his own costs in this appeal, and before the High Court.

Agent for the Appellant: *F. Graham.*
Agents for the Respondent: *Barrow & Barton.*

(1) 15 M. & W. 727.

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WIDOW OF SHUNKER SAHAI . . . . PLAINTIFF;

AND

RAJAH KASHI PERSHAD . . . . . DEFENDANT.

ON APPEAL FROM THE FINANCIAL COMMISSIONER OF OUDH.

Oudh Estates Act, 1869—*Sunnud—Talookdar—Hindu Widow.*

In a suit against the Respondent pending the regular settlement of talook *Sessendee* to establish Plaintiff's right to a direct settlement with her of four villages, and of a one-third share in seven others out of the twenty-six villages of which the talook was composed; it appeared that the Respondent had before judgment obtained a sunnud of the whole talook, his name being entered in the second schedule to Act I. of 1869, and further that he had admitted himself to be trustee for the Plaintiff as respects the said one-third share of seven villages. It also appeared that the Plaintiff was entitled to a sub-settlement of the said four villages:—

Held (1), that the Plaintiff could not establish talookdary rights, for, having no interest in many of the villages, in order to make her a talookdar it would be necessary to reform the sunnud and break up the existing settlement and resettle the estate in three different portions.

Quære, whether the sunnud could be reformed after Act I. of 1869, without a special Act of the Legislature.

(2) The Plaintiff could not under the summary settlement and the order of the 10th of October, 1859, acquire proprietary rights as against the Respondent, who was sole hereditary proprietor of the talook before the summary settlement, and whose rights were reserved under the Proclamation.

(3) The summary settlement not having been made with the Plaintiff *as talookdar*, neither it nor the order of 1859 conferred talookdary rights upon her.

Held, lastly, that the Plaintiff was entitled to a Hindu widow's estate of inheritance in the said four villages, and in a one-third share of the profits of the said seven villages, and to have a sub-settlement of the four villages on terms of paying to the talookdar the government demand *plus* 10 per cent.

Quære, whether the effect of the letter of October, 1859, and the subsequent legislation is to relieve a Hindu widow, though a talookdar, from the disabilities imposed upon her by the general law.

APPEALS from a judgment of the Financial Commissioner of *Oudh* (Col. *Barrow*) dated 7th Nov. 1868.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. ASSESSOR: SIR LAWRENCE PEEL.

The circumstances under which the order was made were these: the widow of *Shunker Sahai*, at the time of the final settlement in *Oudh*, claimed one-third of talooka *Sessendee*, which claim the Rajah *Kashi Pershad* opposed, and her claim was rejected by the Settlement Officer on the 23rd May, 1864; then, on appeal by the Settlement Commissioner, on the 22rd Sept. 1864; then on appeal by the Financial Commissioner, on the 6th Dec. 1864; then on review by the same authority on the 10th July, 1865. A reference having been made to the Government, the matter was again taken up by the Financial Commissioner, who, on the 7th Nov. 1868, made the order now appealed from, whereby he awarded her a life interest in four villages, and a share in the profits of seven other villages. The widow then appealed on the ground that she ought to have been awarded all that she claimed, and the Rajah appealed on the ground that her claim should have been dismissed.

Leith, Q.C., for the Appellant, contended that by the terms of the summary settlement the widow had complete proprietary right to and possession of the said eleven villages.

Bell, for the Respondent, contended that the Appellant was only entitled to maintenance under the Mitshakara law, and that the summary settlement was not made with her, and, at any rate, she was not entitled to more than was allowed to her by the decree.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The Respondent, the talookdar of *Sessendee*, is one of the six loyal talookdars who were excepted by name in Lord *Canning's* proclamation of the 15th March, 1858, from the general sentence of confiscation thereby pronounced against the landholders of *Oudh;* and, as such, has had his name entered in the second schedule annexed to the "*Oudh* Estates Act" (No. 1, of 1869), pursuant to the provisions of the 4th section of that statute. The questions raised by this appeal are, how far the rights of the Respondent are affected by the conflicting rights which the Appellant possesses in certain of the villages comprised in his

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talook, and what effect can or ought now to be given to the latter as against him.

The family connection between the parties is of this kind: one *Imrit Loll* had three sons, *Koondun Loll*, *Mohun Loll*, and *Seetaram*. The pedigree in the Respondent's case states that *Seetaram* left descendants, but that they have no interest in the property; and however this may be in point of fact, *Seetaram* may, for the purposes of this appeal, be treated as having died childless. *Koondun Loll* died in 1838, leaving one son, *Shunker Sahai* (also deceased), of whom the Appellant is the widow, heiress, and representative. The other son, *Mohun Loll*, died in 1837, leaving a daughter, who is the wife of the Respondent.

The talook came into this family by gift from one *Bussunt Koonwur*. The gift was made nominally to *Shunker Sahai*, but, as the Respondent alleges, really in favour of *Imrit Loll*. It is immaterial to consider how this was, because it is admitted on all hands that, either by virtue of pre-existing family arrangements or of the proceedings had since the annexation of *Oudh*, the Appellant can now only claim the whole proprietary right in four, and a one-third share in seven others of the twenty-six villages which compose the talook; the full proprietary right in the remaining fifteen villages belonging to the Respondent.

The fiscal history of the talook is thus given in the Record:— "It is admitted that *Mohun Loll* died in 1243 F., *Koondun Loll* in 1244 F., *Shunker Sahai* in 1248 F.; that from 1243 F. to 1250 F. the engagements for the Government revenue of the talook were taken from the widow of *Mohun Loll*, those from 1251 F. to 1256 F. from the widow of *Shunker Sahai*, those from 1257 F. to 1259 F. from the widow of *Mohun Loll*, and those from 1260 F. to 1263 F. from *Kashi Pershad*, who had married *Mohun Loll's* only daughter, the widows being both alive." Hence it appears that, in 1856, when the annexation of *Oudh* took place, the Respondent was the ostensible talookdar, and he appears to have continued to be such at the date of Lord *Canning's* proclamation.

The present litigation began in March, 1864, when the Appellant commenced preceedings against the Respondent in the Court of the Revenue Officer engaged in making the regular settlement.

The Record, which is in other respects but loosely made up, contains only the pleadings as to one of the seven villages; and therefore it does not clearly appear what was the precise case which she made in respect of the four villages of which she claimed to be sole proprietor. The nature of her claim touching all but the one village in question is only to be gathered from the judgments afterwards to be considered, of which some appear to have dealt with her whole claim.

The plaint set forth in the Record prays, "that the settlement of the proprietary and sub-proprietary rights to one-third share in the village may be made with Plaintiff, according to the provisions of section 167 of the directions to Settlement Officers and of section 31 of Circular No. 2, and that the wajiboorlurz (written representation) may be recorded by the Petitioner." This prayer, whether it does or does not amount to a prayer for talookdary rights as such, when distinguished from ordinary zemindary rights, as understood in *Oudh*, unquestionably imports a claim for a direct settlement of the Appellant's share of the village with her, independently of any superior.

On the 16th of April, 1864, the Respondent put in a petition insisting on the absolute right conferred upon him by the Proclamation of March, 1858; and objecting to the Appellant's being treated even as under-proprietor, as, according to the settlement paper, she does not possess these rights.

In answer to this the Appellant's agent, on the 11th of May, 1864, put in a petition, in which he entered into the history of the talook before the annexation of *Oudh*; insisted in paragraph 4 on the provisions made by the British Government for the protection and maintenance of the rights of persons in possession, and the rights and possession of under-proprietors; and after stating, in paragraph 7, "That if in consideration of the estate having been formally gained by the husband of Petitioner's client, who is in the possession of the same, she is entitled according to law to superior right, the objection of the Rajah's mookhtear to the settlement of under-proprietary right with her cannot be held valid;" he concluded with the expression of a hope that after due inquiry a decree for the possession of the entire estate of *Sessendee* might be passed in the Plaintiff's favour.

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Mr. *Capper*, the Settlement Officer who tried the case in the first instance, came to the following conclusions:—

1st. That the Appellant's claim to the entire talook as given to her late husband, was barred by the grant of the talook by Government to the Respondent.

2ndly. That this did not affect her claim to hold *Pookhta* as under-proprietor, villages which were the proprietary of her husband, and which she was holding in 1855-1856 A.D.; as to which appropriate orders would be issued.

3rdly. That the claim to share in the proceeds of the joint collections of other villages in which she had no distinct proprietary possession in 1855-1856 was barred by the rules which admit no share in a talook. And he added the following observations:—"The common collection must be held to be that of the talookdar, and any distribution of the proceeds must be held to be his voluntary act, granting maintenance to his relations. By the local rules these can only be enforced when the talookdar has bound himself in writing to continue it. If such document exist, it can be separately adjudicated."

His final decree in the case of the particular village sued for by the Plaintiff set out in the Record was in these words:—"I dismiss the claim of the widow of *Shunker Sahai* to under proprietary title in one-third of mouzah *Sessendee Khas*, and decree full under proprietary title to Rajah *Kashi Pershad*."

On appeal this decree was confirmed by Mr. *Currie*, the Settlement Commissioner, on the 22nd September, 1864. In his judgment he states that, although in the Lower Court the Appellant had claimed only one-third of mouzah *Sessendee* in under-proprietary right, she had before the Appellate Court laid claim to the whole; that he refused to admit an appeal for a larger portion than was claimed in the Lower Court; that her claim, such as it was, was barred by the Respondent's sunnud; that any possession which she may have had in the village was of a proprietary, not of an under-proprietary character, and that possession of a proprietary character could not entitle a person to be recognised as an under-proprietor. He added that, inasmuch as the Respondent had voluntarily agreed to allow the Appellant to retain possession of her one-third of the profits for the term of

her life, the Settlement Officer, if she applied for the benefit of this concession, and gave security not to disturb the Respondent further, should take the necessary steps to secure her the rights conceded.

Their Lordships have to observe on this decision that the reasoning on which it is based applies only to the particular village of *Sessendee Khas*, and the other six in respect of which the Appellant claimed one-third of the profits. It has no application to the four villages of which she claimed the full proprietary right, and the record fails to shew distinctly what proceedings were had in respect of the latter after Mr. *Capper's* judgment of the 23rd of May, 1864.

From Mr. *Currie's* order the Appellant brought a special appeal before Mr. *Davies*, the Financial Commissioner, which that officer dismissed on the 6th of December, 1864, regretting that he was legally debarred from interfering with orders of the Lower Courts. And on the 10th of July, 1865, he rejected a subsequent petition for review of judgment, stating that "he fully admitted the hardship of the case, but was unable to point out any legal remedy at present." The first of these orders may have been passed under some doubt as to the powers of the Financial Commissioner. But no such doubt can have existed in July, 1865, when the petition for review was rejected, since Act XVI. of 1865, which received the assent of the Governor-General on the 7th of April, 1865, had been passed intermediately to remove such doubts. On the 18th of July, 1865, the Appellant presented a long petition to the Financial Commissioner, which was the commencement of the proceedings out of which this appeal has directly arisen. This document is in terms confined to the previous adjudication concerning the single village of *Sessendee Khas*. It complains first, that no distinct issue whether the Appellant was or was not in proprietary possession of a third share in mouzah *Sessendee* had been regularly settled and tried in the suit. It contends that such possession was established by, amongst other evidence, a kheut and settlement forming part of the proceedings on the summary settlement of 1858. It then contests the conclusions of the Settlement Commissioner, in his order of the 22nd of September, 1864, to the effect that the Appellant's claim was

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barred by the Respondent's sunnud; and that any possession which she may have had in the village having been of a proprietary, and not of an under-proprietary character, it could not entitle her to be recognised as under-proprietor. It then cites certain paragraphs of a Circular Letter, No. 6 of 1862, and submits that the Petitioner's case falls within the 6th of those paragraphs, and entitles her to have it referred for the orders of the Governor-General in Council, in order to have the Respondent's sunnud reformed. The prayer of this petition was that the Court would be pleased to decree to her the continuance and enjoyment of the rights she was entitled to under and by virtue of the kheut and Settlement Statement A; or to refer the case for the order of the Governor-General in Council, in conformity with the ruling laid down in paragraph 6 of Circular No. 6 of 1862.

This application would seem, from a petition filed by the Respondent, on the 21st of March, 1866, to have been heard by the Financial Commissioner on the 1st of March *ex parte*. The Petitioner complained of this, and finally begged that if his objections were not still to be heard, his petition might be forwarded to his Excellency the Governor-General in Council, with the report which the Financial Commissioner proposed to make in the case. The first step taken by the Financial Commissioner was to write, on the 28th of March, 1866, the letter to the Secretary of the Chief Commissioner of *Oudh* which is in the record.

The important paragraphs in that letter are the following:—

"2. The widow brought her claims in the regular way before the Courts, both for the proprietary rights and then for under-proprietary rights; but it was held that her suit for the first was barred by the sunnud being in the name of Rajah *Kashi Pershad* only, and for the second because any title she may have had independently of our arrangements must have been to full proprietary rights, and that she had none to rights held in subordination to the talooka.

"3. But having allowed her case to be again argued by counsel, I find that although the sunnud was made out in the name of Rajah *Kashi Pershad* alone, it is not in agreement with the orders for the settlement of 1858 A.D.

4. "That settlement was made by a proceeding of Captain

L. Barrow, Special Commissioner of Revenue, a translation of which is annexed for reference. It will be seen that after stating that in 1264 F. (1856 A.D.), fifteen villages were settled with the talookdar (Rajah *Kashi Pershad*), four (1) with the widow of *Shunkur Sahai*, and seven with both as co-partners, and that in the co-parcenary villages two-thirds belonged to the talookdar, and one-third to the widow, the record goes on as follows:—"It is therefore ordered that the triennial settlement of the talookdar be made with Rajah *Kashi Pershad*, talookdar, on a jumma of Rs.23,251, according to the assessment of 1264 F., and that the widow of *Shunkur Sahai* be recorded as co-partner."

"5. The widow's name was duly entered in the kheut as one-third owner of the seven villages referred to, but this document would be of no effect *per se*, and apart from the specific recognition of the widow's right in the settlement proceeding.

"6. According to the Governor-General's Order of the 10th of October, 1859, it is ruled that talookdars with whom the summary settlement was made, thereby acquired the proprietary title in their talookas. This order is generally held to be law. It would follow, therefore, that the widow is entitled to have her name entered in the talookdaree sunnud as owner of the four villages, and in one-third of the seven villages, her proprietary right to which was affirmed by the settlement proceeding."

"13. If the case were within the ordinary jurisdiction of the Courts, nice questions would arise as to the right of the widow of *Shunkur Sahai* to more than a life-interest in her husband's estate, and as to the title of the husband of her brother-in-law's widow to succeed to it. But there is no occasion to discuss these. The talookdar's title is good under his sunnud, but it appears to me that the widow's is equally good to her share as defined under the proceeding of summary settlement.

"14. It should be mentioned that Rajah *Kashi Pershad* is one of those talookdars whose proprietary rights were specially reserved in the Proclamation of the Governor-General, under which the soil of *Oudh* was confiscated. The Rajah maintains that he thus

(1) For these four villages the widow has obtained a sub-settlement after a good deal of litigation. Their names are 1, *Uttergaon*; 2, *Deburreha*; 3, *Bursowan*; 4, *Kurrowlee*.

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became proprietor of the whole talooka, how many soever shareholders there may have been previously. Without discussing this point on its merits, I may observe that it is not available to the Rajah in the particular case, as the terms of the Government Order of the 10th October, 1859, are distinct, that those with whom the summary settlement was made became *ipso facto* proprietors without reference to any antecedent rights.

"15. As much stress is laid on the rigid maintenance of the literal terms of the settlement of 1858, and as the widow has gone to much expense to have the case argued on that ground, I hold that it is not open to me to do otherwise than state the case as above for the consideration of the Chief Commissioner."

There is considerable confusion in the Record as to what was done, or intended to be done, on this report. This is a question which will be hereafter considered. One thing is certain, that nothing final was done until the 7th of November, 1868, when Colonel *Barrow*, who had then become Financial Commissioner, made an order, of which the substance is contained in the following paragraph:—"On these grounds, therefore, a life interest in the four villages named in the margin is decreed to the widow of *Shunker Sahai*, who will pay the Government demand, plus 10 per cent. only, to the talookdar: and she will be also entitled to a one-third share of the profits in the seven villages named in margin when the annual accounts are made up." Against this order the Appellant under leave of the Court in *Oudh* has appealed to Her Majesty in Council, and the Respondent, with the like leave, has preferred a cross appeal.

The Appellant in her case describes the order as *a proceeding purporting to be a judgment* of the then Financial Commissioner; and her learned counsel on the opening of the appeal treated the order as one made *ultrà vires*. Their argument on this point seemed to assume that the memorandum of Major *MacAndrew* was in the nature of an order made by competent authority, which sent the case back to the Judicial Commissioner for adjudication upon one point only, viz., whether, by the summary settlement the widow was declared entitled to the third of the whole estate, or only to the four villages and one-third of the seven. It seemed also to assume that, by the report of Mr.

Davies of the 28th of March, 1866, whatever power the Financial Commissioner might have had to determine generally the rights of the parties on the merits was spent; and, further, that the Chief Commissioner either had determined to refer the case to the Governor-General in Council, in order to have the Respondent's sunnud altered according to the result of Major *Barrow's* answer to the specific question referred to him, or at least had reserved to himself the power of so determining when he should receive the answer. If this were the true view of the case, it would, in their Lordships' opinion, be a very grave question whether any appeal against the order would lie to Her Majesty in Council. It was indeed suggested that the order, though made without jurisdiction, purported to be a judicial order, and consequently that the appeal would lie. But even if that were so, the utmost their Lordships could do would be to discharge Colonel *Barrow's* order as made without jurisdiction. They would certainly decline to adjudicate upon the propriety of the reformation of the Respondent's sunnud by the Governor-General in Council, an act to be done, not by any Court of Justice, but by the Supreme Executive Authority in *India*.

Their Lordships, however, having come to the conclusion that this view of the case is erroneous, do not think it necessary to consider more particularly what could or ought to have been done, had it been correct. They conceive that the argument ascribed a force and an effect to the memorandum of Major *MacAndrew* which do not belong to it. That gentleman had no power or authority to direct a judicial inquiry into any matter. He was but the secretary of the Chief Commissioner, also an executive officer. The memorandum in question does not even purport to be an extract from a despatch written by the authority of the Chief Commissioner. It is more like the mere memorandum of a secretary or *précis* writer submitting, for the information of his superior, his own view of the documents on which the latter was to pass an order. Again, this paper is dated the 10th of April, 1866; and it appears from the Record that on that date the Respondent was petitioning the Chief Commissioner; that the Appellant's counsel was addressing the same officer on the 6th of October, 1866; that in October, 1867, the Appellant was memo-

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rialising the Governor-General in Council and treating the question as still open; that the Chief Commissioner had returned the files to the officiating Financial Commissioner, suggesting that this case should be disposed of by mutual agreement or by the talookdar's association; that some such arbitration was attempted, but that in December, 1867, the Appellant, dissatisfied with that course of proceeding, prayed that the trial of her case should be sent back to the Financial Commissioner; and that, finally, both parties appeared by counsel before Colonel *Barrow*, as Financial Commissioner, on the 7th of November, 1868, and argued their respective cases before him. The conclusion, therefore, to which their Lordships have come upon these confused, and perhaps somewhat irregular, proceedings, is that the Chief Commissioner never took action upon Mr. *Davies'* Report, in order to have the Respondent's sunnud reformed, or determined to take such action; but that in November, 1868, the case raised by the Appellant's petition of the 18th of July, 1865, was still open for adjudication by the Financial Commissioner; and that the order under appeal must be taken to be the final judicial order on that petition. The learned counsel for the Appellant, at the close of the argument, seemed to intimate their desire to have the case thus dealt with. The learned counsel for the Respondent, however, did not abandon their contention that the suit had been finally disposed of when Mr. *Davies* rejected the first petition for review; and that the petition of the 18th of July, 1865, and all the subsequent proceedings were irregular. Looking, however, to the proceedings of the Courts below, to the conduct of the Respondent therein, and, indeed, to his printed case filed on this appeal, their Lordships are not disposed to adopt this view, but consider that it is open to them to review, as they will now proceed to do, Colonel *Barrow's* order on its merits.

The first question is, whether the Appellant has made out a title to any talookdary rights. It is admitted on all hands that the Respondent's sunnud, whilst it stands, is an effectual bar to her claim of such rights. And, since she has no interest in many of the villages comprised in the talook, it would apparently be necessary, in order to make her a talookdar, not only to reform the Respondent's sunnud, but also to break up the existing settlement,

and to resettle the estate in three different portions. Whether, since the passing of the *Oudh Estates Act*, the first of these objects could be effected even by the Governor-General in Council without a special Act of Legislature, seems to their Lordships to be very questionable. The second will be found to be inconsistent with the title to talookdary rights which she sets up. For it is admitted by Mr. *Davies*, the officer most favourable to her, that the sole foundation on which her title rests is to be found in the summary settlement of 1858, and the effect given thereto by the Governor-General's Order of the 10th of October, 1859. In paragraph 8 of his letter he says distinctly: "It is nothing to the purpose to inquire whether the widow had any rights independent of the summary settlement, or whether under it she got more or less than she was entitled to, as its effect has been made absolute and irrevocable." It is, however, clear that, if the summary settlement did anything, it treated all the twenty-six villages as forming one talook, to be settled for with somebody as talookdar, at one aggregate jumma.

Again, their Lordships are not disposed to assent to the proposition contained in the 14th paragraph of Mr. *Davies*' letter, to the effect that a title derived from the summary settlement and the Governor-General's Order must be taken to override the rights acquired by the Respondent under the Proclamation. Before the summary settlement the Respondent had been declared sole hereditary proprietor of the lands which he held when *Oudh* came under British rule (he seems to have been then talookdar), subject only to such moderate assessment as might be imposed on them; and the proprietary right of all other persons in the soil stood confiscated to the British Government, which reserved to itself the right of disposing of it. He had, therefore, at the date of the settlement the declared right to engage for the revenue. His doing so could not supersede or detract from the rights which he had already acquired, or become the foundation of his title. On the other hand, the general body of talookdars re-acquired no interest in their forfeited lands until they had been admitted to make the settlement. Accordingly the *Oudh Estates Act*, though it enacts that the estates of both classes of talookdars shall be of the same nature, and be held subject to the same conditions, recognises the

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distinction between them in the matter of title; and directs that the Respondent, and the four other loyal talookdars in the same category with him, shall have their names entered in a separate schedule.

Lastly, their Lordships are of opinion that there is no ground for holding that the summary settlement, and the subsequent Order of 1859 have conferred talookdary rights on the Appellant. The order declared that every talookdar with whom a summary settlement had been made since the re-occupation of the province had thereby acquired certain rights. To bring any person within the operation of this clause, he must be shewn to be one with whom a summary settlement was made between the 1st of April, 1858, and the 10th of October, 1859, *as talookdar*. It does not appear to their Lordships that this can be predicated of the Appellant. She never entered into any engagement for the revenue. From the settlement proceedings, the Statement A, and the Roobacarry, it appears that the Rajah was the only person who applied for the settlement; that he sought to settle for all the twenty-six villages as one estate or talook; that he was described on the face of the proceedings as "the talookdar," the Appellant being spoken of only as the widow of *Shunker Sahai;* and that the triennial settlement was then directed to be made, and was made with him, the kaboolyut being taken from him alone. Undoubtedly the application of the Rajah stated the interest of the applicant both in the four and in the seven villages, and admitted that, in 1856, and immediately after the annexation of *Oudh*, there had been three distinct settlements of the villages for which he was then seeking to settle as one entire estate or talook. But this latter fact, though consistent with the fiscal policy which prevailed between the annexation and the mutiny, is alike inconsistent with the policy inaugurated by *Lord Canning's* Proclamation, with the *status* of talookdar thereby assured to the Respondent, and with the final order of the Settlement Officer. The construction which their Lordships would put on the words "and that the name of *Shunker Sahai's* widow be recorded as shareholder" is not that the Settlement Officer gave or intended to give to the Appellant the right of making a summary settlement as talookdar, but simply desired to place on record, for her

benefit, her admitted proprietary and beneficial interest in some, and some only, of the villages which made up the settled talook.

If this be so, the next question is to what, if any, relief is the Appellant entitled, though she has failed to establish a title to talookdary, or even to malgoozaree rights. It will be convenient to consider this first with respect to her interest in the seven villages, and afterwards with respect to the four villages, since her interests in the two classes of villages may admit of different considerations.

As to both, however, it is to be observed that the necessary consequence of holding that the twenty-six villages have been conclusively thrown into one talook, of which the Respondent is sole talookdar, is that the interest of the Appellant in the villages in which she is interested, whatever it may have been originally, has become in some sense subordinate or sub-proprietary. The *Oudh* Blue Book and in particular the memorandum of Mr. *Charles Currie*, shew how, under the native Government, the great talooks grew up, and how sometimes by a process of disintegration sometimes by one of acquisition they came to include zemindaries in which all proprietary right, short of a nominal superiority, was vested in persons other than the talookdar. In such cases the talookdar alone held, as it were, *de capite* from the State, and alone engaged for the payment of the public revenue; but he held his lands subject to the rights of the proprietors intermediate between him and the cultivators of the soil. It seems to have been the general policy of the *Oudh* settlement, begun by Lord *Canning* and continued by his successors, to perpetuate this system, however much the authorities may from time to time have somewhat oscillated between the policy of creating a landed aristocracy, and that of protecting against such an aristocracy the rights, real or supposed, of others in the soil. Their Lordships can see no reason why the Appellant because she may have originally claimed the superior, should not be allowed to assert in this suit any subordinate right to which she may be entitled. And this, which was originally the view of Mr. *Capper*, seems to have been finally ruled by Colonel *Barrow*. And it may be observed that in some of the earlier proceedings she has put her case in the alternative.

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Again, Mr. *Capper* seems to have admitted, as to the seven villages, that though the Appellant had not been in independent possession of one-third of the collection of these villages; though the collections were made in common and therefore presumably by the Respondent, the talookdar; yet that the latter might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit, because her agent had failed to produce a deed in writing so binding the talookdar. Colonel *Barrow* however appears to have held that the admission of the Rajah at the time of the summary settlement, and on other occasions (the former being in the nature of an admission on record), were equivalent to such a deed; and that accordingly the relation of trustee and *cestui que trust* having so to speak been established between them, she was entitled to a one-third share of the profits of these villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur.

Colonel *Barrow's* order also recognises the proprietary interest, treating it as a subordinate interest, of the Appellant in the four villages. But the Appellant insists that he has improperly subjected her to pay a percentage of 10 per cent. to the talookdar over and above the Government demand. It is somewhat difficult for their Lordships, in the absence from the Record of the proceedings relating specifically to these villages, to deal with this portion of the Appellant's case. In a marginal note to his letter of the 28th of March, 1866, Mr. *Davies* states that the widow had obtained a sub-settlement for these four villages. If that were a final settlement their Lordships, on the materials before them, would not see their way to disturbing it. Colonel *Barrow* however appears to have thought that the amount payable by the Appellant to the Respondent in respect of these villages was a point open to him for decision; and his finding thereon is now to be reviewed. If there were no positive law on the subject their Lordships would see no ground for subjecting the Appellant, who as zemindar must be in the collection of the rents, to the payment of more than her proportion of the Government revenue. But the propriety of the imposition of this 10 per cent. seems to

depend upon the effect of the provisions of the *Oudh Settlement Act*, No. XXVI. of 1866. That Act was passed to give the force of law to certain rules regarding sub-settlements and other subordinate rights of property in *Oudh*. They seem to apply to all persons possessed of subordinate rights of property in talooks in *Oudh;* and the 3rd clause of the 7th of these Rules says, "In no case can the amount payable during the currency of the settlement by the under proprietor to the talookdar be less than the amount of the revised Government demand, with the addition of 10 per cent." Colonel *Barrow* appears, therefore, to have made the amount payable by the Appellant the least which, in his view of it, the law permitted.

Their Lordships conceive that they too are bound by this enactment. If the view which they have taken of the Respondent's rights as talookdar is correct, it is impossible to treat the interest of the Appellant in these villages as other than that of a subordinate zemindar. If she has lost the right of settling directly with Government for the revenue, she must, if she retains any interest in the villages, be treated as one entitled to, and liable to make a sub-settlement for them. And if this be so, she seems to fall within the provisions of the statute.

The only remaining question relates to the extent and nature of the Appellant's interest in the property which has been found to belong to her. Colonel *Barrow* has decreed to her only a life interest. He seems to have had a notion that if her interest were more than this she would have an absolute power of disposing of the villages and of breaking up the talook. This could only have happened had she been found entitled to full talookdary rights; and even in that case it may be doubted whether the effect of the Governor-General's letter of 1859 and the subsequent legislation is to relieve a Hindu widow, though a talookdar, from the disabilities imposed upon her by the general law. Such a construction seems opposed to the 23rd section of the *Oudh Estates Act*, at least as regards a widow who takes a talook by inheritance. The Appellant, however, is now to be treated not as a talookdar, but as the proprietor of certain villages and rights within a talook. These she acquired by inheritance from her husband, and her estate is not a life interest, but the estate of inheritance of a

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Hindu widow with all its rights and all its disabilities. Their Lordships therefore will humbly recommend her Majesty to vary the order under appeal by declaring that the Appellant, as the widow and heiress of *Shunker Sahai*, is entitled to a Hindu widow's estate of inheritance in the four mouzahs, *Daberia*, *Bursooa*, *Kuroulee*, and *Ooturgaon*, and in a one-third share of the profits in the seven mouzahs, *Sessendikhas*, *Salsamow*, *Laloomur*, *Shahpur*, *Kharehra*, *Meerrampur*, and *Jubrelah*, such share to be ascertained and paid when the annual accounts are made up, and that she is further entitled to have a sub-settlement of the said four villages on the terms of paying the Government demand plus 10 per cent.

In this case in which there are appeal and cross appeal, neither of which has been wholly successful, their Lordships think that each party should bear his or her own costs.

Agent for the Appellant: *T. L. Wilson.*
Agents for the Respondent: *Hendersons.*

RANEE OF CHILLAREE . . . . . PLAINTIFF;

AND

THE GOVERNMENT OF INDIA . . . . DEFENDANT.

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ON APPEAL FROM THE FINANCIAL COMMISSIONER OF OUDH.

Oudh Estates Act, 1869—*Talookdar—Temporary Settlement—Resumption Order of the 10th of October*, 1859.

In a suit brought in 1867 to establish Plaintiff's right to a talookdary in *Oudh*, as grandmother and heiress to a deceased infant rajah, with whom a summary and temporary settlement thereof had been made; it appeared that the talook had been, after the death of the infant rajah, and before the order of the 10th of October, 1859, resumed by the Government:—

Held, that the plaintiff as heir of a talookdar who had been permitted to engage for the revenue, but who had died before the letter of the 10th of October, 1859, was not entitled to the permanent hereditary and transferable proprietary right described thereby, but which had never vested in the deceased Rajah.

Act I. of 1869 did not apply to the case.

APPEAL from a judgment of Colonel *Barrow*, Financial Commissioner of *Oudh* (Oct. 21, 1868), reversing on special appeal a judgment and order of the Commissioner of *Seetapore* (Aug. 13, 1868), which in regular appeal affirmed (subject to a certain modification) an order of the Assistant Settlement Officer of *Seetapore* (Feb. 17, 1868), entirely in favour of the Appellant.

The suit was brought in the course of the regular settlement of the province of *Oudh* by the Appellant as the grandmother and heiress (according to Hindu law) of one *Digbehoy Singh* (who died an infant and unmarried, without leaving any preferable male heir), claiming that the Government settlement should be made with her as proprietor and talookdar of talooka *Chillaree*, being (as she contended) a talooka in the strict *Oudh* sense of the term. In her suit she stated that after the re-occupation of *Oudh* by the British troops, subsequent to the Mutiny and after the death of the former talookdar (*Bulbhuder Singh*, who was her son and

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

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father of the minor *Digbehoy*) the summary settlement of the said talooka was made by the British Government with or on behalf of the said infant as talookdar; and contended that the same was within the scope of the declaratory order of the Governor-General in Council, 10th October, 1859, having under sect. 25 of the *Indian Councils Act*, 1861, the force of law, and which publicly declared the legal effect of previous summary settlement orders as follows:—"Every talookdar with whom a summary settlement has been made since the re-occupation of the province, has thereby acquired permanent hereditary and transferable proprietary right in the talooka for which he has engaged, including the perpetual privilege of engaging with Government for the revenue of the talooka." She further stated that the minor died about a year after the summary settlement made with him as aforesaid, leaving her, as his grandmother, his sole heir according to Hindu law him surviving, and that his entire interest in the talooka became vested in her; and she then charged that certain acts and orders under which the villages in the talooka had been given and disposed of to others by the servants of the Government, to the prejudice of her rights as such heir, were contrary to law and therefore invalid.

The Respondent contended that the estate of *Chillaree* was confiscated by a proclamation of the 15th of March, 1858; that *Bulbhuder Singh* did not come in and submit to the Government in terms of that proclamation, but was killed in open rebellion; but that as an act of grace the Government did settle the estate summarily with the said *Digbehoy Singh*, his minor son; and that as he died on the 1st of March, 1859, the estate had again come into the hands of Government for disposal, as the summary settlement *per se* conferred no right (as he also contended), unless in existence on the 10th of October, 1859, and that *Digbehoy* derived no valid proprietary right from the Government order of that date, because he had died intermediately between the summary settlement with him and the said order.

Leith, Q.C., and *T. Thomas*, for the Appellant, contended that the order of the Commissioner of *Seetapore* declaring that the Appellant as grandmother and heiress of *Digbehoy Singh* was entitled

to the talooka was right. Under the summary settlement *Digbehoy Singh* acquired a "permanent hereditary and transferable proprietary right" in the talooka: see the General Order of the Governor-General in Council dated the 10th of October, 1859. No other confiscation of the talooka took place beyond the confiscation by Lord *Canning's* Proclamation, the effect of which was removed in this case by the summary settlement. Possession was taken by the Government, not under any confiscation, but in the exercise of a supposed right as *ultimus hæres*, and upon the alleged failure of the heirs of *Digbehoy Singh*.

Forsyth, Q.C., and *Norman*, for the Government, contended that the estate in question had been confiscated, and had never been granted afresh to any person from whom the Appellant claimed or could claim. The Appellant's name moreover was not included in the lists specified in Act I. of 1869, and therefore under sect. 10 she could not be considered as a talookdar or grantee. The estate in question was never legally vested in *Digbehoy*, and even if it had been, it escheated to the Crown at his death.

The judgment of their Lordships was as follows:—

This is an appeal from a decision of the Financial Commissioner of *Oudh*, dated the 21st of October, 1868, reversing on special appeal a judgment of the Commissioner of *Seetapore*.

The suit was brought by the present Appellant against the Government of *India*, the present Respondents and others in the Court of the Assistant Settlement Officer of zillah *Seetapore* in the course of a regular revenue settlement for the province of *Oudh*. The object of the suit was to establish the alleged right of the Plaintiff to the proprietorship of talooka *Chillaree*. The plaint was filed on the 26th of January, 1867.

The Plaintiff was the mother of Rajah *Bulbhudur Singh*, who was killed at *Nawabgunj* in the year 1858, whilst fighting in open rebellion against the British Government. He left a widow *enceinte*, who shortly afterwards gave birth to a son, Rajah *Digbehoy Singh*. It was found by the Assistant Settlement Officer, the Court of first instance, that a summary settlement for the talooka, comprising ninety-two villages, was made with the infant Rajah

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Digbehoy Singh by Mr. *Forbes;* that it was confirmed by the Financial Commissioner, and that it remained in force until the child's death on the 25th of March, 1859. The mother died a few days later, leaving the Plaintiff the grandmother, the heiress of the child according to the Hindu law. It was also found by the Assistant Settlement Officer, that, "in July, 1859, Captain *Thomson*, the Deputy Commissioner, wrote to the Commissioner giving a statement of the case, and recommending, apparently on grounds of policy, that the talooka should be resumed; that the case was forwarded to the Chief Commissioner for orders, who, after consulting the Judicial Commissioner as to the nature of the present claimant's rights, finally rejected her claim and reported the resumption of the estate to the Government of *India*."

The estate was, in fact, resumed, and in September 1859, an allowance of Rs.5000 a year out of the estate, commencing from the death of the child was, with the sanction of Government, reserved to the Plaintiff for life.

The Assistant Settlement Officer gave judgment in favour of the Plaintiff and decreed to her the absolute hereditary and transferable right in all the villages included in the settlement with Rajah *Digbehoy Singh*. On regular appeal to the Commissioner, the decree was modified by ordering that the Plaintiff was to have only a life interest in the property, and that execution should issue in a month. The effect of those decrees if upheld would be to subject the present holders, to whom the greater portion of the estate has been granted for loyal services, to be turned out of possession at any rate during the life of the Plaintiff. The Financial Commissioner, upon special appeal, reversed the decision of the lower Courts and dismissed the Plaintiff's suit.

It was contended at the Bar by the learned counsel for the Respondents, that the revenue settlement with Rajah *Digbehoy Singh* was never completed, and, indeed, it was so held by the Financial Commissioner in the third reason given in the conclusion of his judgment. But their Lordships are of opinion that the first two lower Courts, having substantially found that a revenue settlement was made with the infant, it was not open to the Financial Commissioner on special appeal to overrule those findings. Indeed,

the grounds of special appeal to the Financial Commissioner did not raise the question whether a summary revenue settlement was in fact made with the infant *Digbehoy Singh*, but merely the questions whether the summary settlement was ratified by the letter of Government of the 10th of October, 1859, and whether the estate sued for was legally vested in the infant.

It appears to their Lordships that it must be assumed, in accordance with the findings of the first two Courts, that a revenue settlement was in fact entered into with the infant Rajah, but that the talooka was resumed by Government after his death, and ong before the letter of the 10th of October, 1859.

It is clear that, by the proclamation of the Governor-General of he 15th of March, 1858, the authority of which cannot now be lisputed, the proprietary right in the talook in question was, together with nearly the whole of the proprietary rights in the soil of the Province of *Oudh*, confiscated to the British Government; and that that right was liable to be disposed of in such manner as the Government might think fit. It is equally clear that the temporary revenue settlement entered into with the infant Rajah did not of itself vest in him the absolute proprietary and inheritable right in the talooka. The duration of the revenue settlement was limited to three years, which period had expired long before the Plaintiff's suit was commenced. The sole question is, whether the letter of the Governor-General of *India* in Council of the 10th of October, 1859, coupled with that revenue settlement, vested an absolute proprietary and inheritable right to the talooka in the young Rajah, who died on the 25th of March, 1859, more than six months before that letter was written; or if not, whether it vested in his heirs at law as grantees, an inheritable proprietary right which the deceased Rajah himself never possessed.

The letter, which was from the Secretary to the Government of *India*, Foreign Department, to the Chief Commissioner of *Oudh*, is set out in the first schedule to the *Oudh Estates Act*, No. 1 of 1869. The second paragraph of the letter is as follows:—

"2. His Excellency in Council, agreeing with you as to the expediency of removing all doubts as to the intention of the Government to maintain the talookdars in possession of the talooks for which *they* have been permitted to engage, is pleased

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to declare that every talookdar with whom a summary settlement *has been made* since the re-occupation of the province, *has* thereby acquired a permanent, hereditary, and transferable proprietary right, viz., in the talook for which *he has* engaged, including the perpetual privilege of engaging with the Government for the revenue of the talooka."

The letter and the recital contained in it shew that the object of the Government was to maintain in possession those talookdars who then were in possession under summary settlements entered into with them after the re-occupation of the province. The talookdars who were declared to have acquired the right conferred by the letter, were those who had been permitted to engage. Nothing was said as to the heirs of talookdars who had been permitted to engage and who had died between the time of the engagement and the date of the letter. It is not necessary to decide whether such heirs, if in possession at the date of the letter, would have been within the spirit or meaning of it. It is clear that the letter, which was a mere act of grace, was not intended to operate as an original grant to such heirs, for, if such were the case, the heir, if a widow mother or grandmother would have taken an estate descendible to her own heirs instead of the estate of a Hindu female heiress descendible to the heirs of the person to whom she succeeded; and thus the estate would have been taken out of the family of the talookdar who had been permitted to engage. The letter could not operate as a grant of an hereditary estate to a deceased talookdar and his heirs. The only way in which it could operate for the benefit of the heirs of a deceased talookdar, who had been permitted to engage in a summary settlement, would be, by its being treated as a retrospective declaration of the effect of the revenue settlement for which he had been permitted to engage. Such a construction cannot be put upon the letter with reference to a talookdar who had died long before the date of the letter; upon whose death the estate had been resumed by Government, and whose heirs had not been permitted by Government to succeed to the talooka even during the continuance of the temporary revenue settlement.

Their Lordships are of opinion that the letter ought to receive a liberal interpretation in order to effectuate the intentions of the

Government; but they consider that it would be acting in direct opposition to those intentions if the letter were to be read in the sense contended for, as one which pledged the Government to restore a possession to which they had, in fact, put an end, and to vest in a dispossessed claimant an interest which the settlement itself did not give. Such an interpretation would be contrary both to the letter and spirit of the document, and at variance with every legitimate rule of construction. Their Lordships, therefore, concur in the view of the Financial Commissioner that the letter of the Governor-General in Council of the 10th of October, 1859, did not apply to the revenue settlement for which the infant Rajah was permitted to engage and which was resumed by Government after his death, and before the letter was written; and that it was not intended by that letter to create in the Plaintiff a proprietary right by inheritance in the talook by virtue of a temporary revenue settlement for three years to which she had not been allowed to succeed. The temporary revenue settlement was resumed in 1859, and the suit was not brought until 1867.

Their Lordships are of opinion that Act No. I. of 1869 cannot apply to this case, in which the suit was commenced in 1867, and finally decided by the Courts in *Oudh* in 1868; but even if the Act could apply by retrospective operation it would not vest a right in the Plaintiff, for the word "talookdar" in the 3rd section of the Act, was defined to mean "a person whose name is entered in the first of the lists mentioned in section 8," and the Plaintiff's name has never been entered in such list. The case of the Appellant does not appear to their Lordships to fall within either the words or the spirit of the letter of the 10th of October, 1859, or of the *Oudh Estates Act* of 1869. They will, therefore, humbly recommend Her Majesty in Council to affirm the decision of the Financial Commissioner with the costs of this appeal.

Agent for the Appellant: *T. L. Wilson.*
Agents for the Respondent: *Lawford & Waterhouse.*

END OF VOL.

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ACQUIESCENCE: *See* PRESCRIPTION.

ACT VIII. OF 1859, sect. 2: *See* RES JUDICATA.

ACT VIII. OF 1859, sect. 15.] A merely declaratory decree may be made without granting any consequential relief, or where the party does not actually seek for consequential relief in the particular suit. The Court must see that the declaration of right may be the foundation of relief to be got somewhere, *e.g.*, in a Court other than that where the declaratory decree is sought. Thus a declaration of title may be made in a Civil Court with a view to the Plaintiff suing under Act X. of 1859, for enhancement of rent in a Revenue Court.—Where a discretion to make such decree is shewn to exist, the Privy Council will not upon light ground interfere with the exercise of that discretion. SADUT ALI KHAN *v.* KHAJEH ABDOOL GUNNEE. KHAJEH ABDOOL GUNNEE *v.* MUSSUMAT ZAMOORUDOONNESSA KHANUM - - 165

—— *See* DECLARATORY DECREE.

ACT OF STATE.] Begum *S.* being a jaghiredar holding lands upon a jaidad tenure and exercising within her jaghire a sort of sovereignty delegated from *Scindia*, agreed to hold the same "as long as she may live" as a jaidadar under the Company, to which *Scindia's* sovereignty was ceded on the 30th of December, 1803. During her lifetime the operation of British law and the jurisdiction of British Courts were excluded from her territories; after her death Regulation law was introduced therein by order of the Governor-General authorized by Act XVII. of 1836. On her death, but before the introduction of the Regulation Law, the Government, acting in the political department, resumed the lands so held as aforesaid, and seized the arms and stores appertaining to the tenure.—In a suit by the representatives of *D. S.* claiming under the Begum's deed or will to recover possession of the said lands, and to hold them free from assessment to Government revenue:—*Held*, that the resumption was not an act of state. It was not the seizure by arbitrary power of territories which up to that time had belonged to another Sovereign State; it was the resumption, under colour of a legal title, of lands previously held from the Government by a subject under a particular tenure, upon the alleged determination of that tenure. The validity of that title to resume is *primâ facie* cognizable by the Municipal Courts of *India*.—*Secretary of State for India* v. *Kamachee Boye Saheba* (7 Moore's Ind. Ap. Ca. 476) distinguished.—*Held*, further, upon the evidence, that the Plaintiffs had not established their title to the lands, as alleged.—But it appearing that the arms and stores were purchased by the Begum, and that there was nothing to disprove her title to the things so purchased, *held*, that the Plaintiffs were entitled to recover the value thereof, with interest. FORESTER *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL - - - - 10

2. —— The status of the King of *Delhi* was that of a king and not a mere jaidadar. The seizure and confiscation in 1857 of the revenues and territories granted to him in 1804 were acts of state, not done under colour of any legal right of which a municipal Court could take cognizance. —*Forester* v. *Secretary of State of India* (*ante*, p. 10) distinguished.—*Held*, also, that the King's ownership of such revenues and territories, according to the true meaning and intent of the grant in 1804, involved no power of disposition, and that all charges and incumbrances created by him out of his estate fell with the estate itself, and could not be enforced either at his death or deposition.—Circular Order, No. 112, issued by the Judicial Commissioner of the *Punjaub* as to the liability of the Government for the debts of rebels whose estates had been confiscated, is not a law within the meaning of 24 & 25 Vict. c. 67.—*Lalla Narain Doss* v. *The Estate of the ex-King of Delhi* (11 Moo. Ind. Ap. Ca. 277) commented upon. RAJAH SALIG RAM *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL - - - 119

ACT OF THE INDIAN LEGISLATURE, No. IV. OF 1869: *See* DIVORCE À VINCULO.

AGREEMENT WITH FIRM FOR COMMISSION ON NET PROFITS AND INTEREST: *See* PARTNERSHIP.

ARREARS OF MAINTENANCE: *See* HINDU WIDOWS.

ASSENT OF THE WIFE AFTER PUBERTY: *See* MAHOMEDAN LAW.

AUCTION PURCHASER: *See* GHATWALI TENURES.

CAUSE OF ACTION: *See* MAHOMEDAN LAW.

—— *See* RES JUDICATA.

CHANGES IN THE BED OF A RIVER: *See* RIPARIAN PROPRIETOR.

CIRCULAR ORDERS: *See* ACT OF STATE. 2.

CONFISCATION: *See* ACT OF STATE. 2.

CONSEQUENTIAL RELIEF IN COURT OTHER THAN THAT WHICH MAKES DECLARATORY DECREE: *See* ACT VIII. OF 1859, SECT. 15.

CONSTRUCTION: *See* HINDU LAW. 2.

CONSTRUCTIVE KNOWLEDGE BY OWNER OF SERVIENT TENEMENT: *See* PRESCRIPTION.

CUSTOM: *See* HINDU LAW. 1.

—— *See* RIPARIAN PROPRIETORS.

DECLARATORY DECREE.] A declaratory decree cannot be made unless the Plaintiff would be entitled to consequential relief if he asked for it. Even if he would be so entitled, it is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for.—A suit to declare null and void certain deeds of gift and acceptance of a child in Hindu adoption, brought by the donee against the donor, the child not being a party to the suit, *held* not to be maintainable. The deeds were not necessary to a valid adoption, and if the deeds were set aside the adoption if it had taken place might be proved *aliunde*. If the deeds operated merely as an agreement to give and take in adoption, and a breach thereof had occurred, such breach would not render the deeds null and void, or constitute any ground for setting them aside or for declaring them null and void. SREE NARAIN MITTER *v.* SREEMUTTY KISHEN SOONDORY DASSEE - - - - 149

2. ——: *See* ACT VIII. OF 1859, SECT. 15.

DELAY IN BRINGING A SUIT: *See* DIVORCE À VINCULO.

DEMAND OF PAYMENT: *See* MAHOMEDAN LAW.

DISCRETION: *See* DECLARATORY DECREE.

DIVORCE À VINCULO.] The Indian *Divorce Act*, No. IV. 1869, sect. 7, provides, that in all suits and proceedings brought under that Act relief is to be given on principles and rules which, in the opinion of the Courts, are as nearly as may be conformable to the principles and rules which the Court for Divorce and Matrimonial Causes in *England* acts on and gives relief.—The alleged cause of action arose in 1859 or 1860, the misconduct of the wife having come to the knowledge of the husband in 1862. He took no steps till 1869, when he brought a suit in *India*, under Act No. IV. of 1869, for a divorce *à vinculo*, charging his wife with adultery with the co-Respondent *A.* and others. The suit was heard in the absence of *A.*, and the wife did not appear. The Court of first instance dissolved the marriage. On appeal to the Chief Court, application was made to hear

DIVORCE À VINCULO—*continued.*

further evidence, as provided by the 17th section of the Act, which the Court refused, and by its decree confirmed the sentence of the first Court: —*Held*, by the Judicial Committee, that in the absence of *A.*, and the refusal to allow him to be examined to rebut the Plaintiff's case, and considering the inconclusive and unsatisfactory nature of the evidence, coupled with the long delay in bringing the suit, such decree of confirmation could not be maintained, and the sentence reversed, with costs, in the Courts below and on appeal.—The reservations contained in the *Limitation of Suits Act*, No. XIV. of 1859, sect. 1, cl. 16, do not apply to suits for divorce *à vinculo*. —Although, as a general rule, the Judicial Committee will not reverse the concurrent findings of Courts in *India* on a question of fact, yet there may be circumstances to take such findings out of the scope of the general rule, as in the case of a divorce *à vinculo*, in which, by Act No. IV. of 1869, sect. 17, a decree made by the Court of first instance is only binding on confirmation by the Chief Court, which decree is not to be considered as a separate judgment. HAY *v.* GORDON [106

DONEE MUST BE IN EXISTENCE WHEN GIFT TAKES EFFECT: *See* HINDU LAW. 2.

EFFECT OF DECREE: *See* RES JUDICATA.

EQUITABLE OWNER: *See* VENDOR AND PURCHASER.

ESTATES IN TAIL MALE: *See* HINDU LAW. 2.

GHATWALI TENURES.] *Held*, that certain ghatwali tenures which had been created before the permanent settlement at a fixed rent could not be determined by a zemindar dispensing with the ghatwali services (which as between him and the Government were no longer required), so long as the ghatwals were willing and able to perform those services.—*Held*, that certain other ghatwali tenures which had been created after the permanent settlement could not, under Regulation XLIV. of 1793, be cancelled by a purchaser at a sale for arrears of Government revenue.—The Government having wrongfully resumed certain ghatwali lands were directed to refund mesne profits thereof, which consisted of the rent paid by the ghatwals under a settlement in force with them until the resumption was set aside:—*Held*, that, inasmuch as the ghatwhals held the lands upon a tenure by which they were liable to certain rent and services, such refund should be made by paying to the zemindar the rent which was due to him by the ghatwals under the tenures, and returning to the ghatwals the remainder of the money. RAJAH LEELANUND SINGH BAHADOOR *v.* THAKOOR MUNOORUNJUN SINGH - - 181

GIFT: *See* HINDU LAW. 2.

HINDU LAW.] The rule of succession to an impartible subject, as a raj or office, is generally regulated by some local or family usage, which, however, must be ancient, invariable, and clearly proved; otherwise, the rule of succession must be

HINDU LAW—*continued.*

deduced from settled rules of Hindu law, and the principles on which they are founded.—Such rules are that, 1. The first-born son by reason of his general pre-eminence is preferred to his younger brother: 2. Where the sons are by different mothers of equal caste seniority is according to birth, and not in right of the mother (unless possibly in the case of the first wife) according to priority of marriage. RAMALAKSHMI AMMAL *v.* SIVANANANTHA PERUMAL SETHURAYER [1

2. —— (BENGAL SCHOOL.] The following general principles affecting the transfer of property must prevail wherever law exists:—(*a.*) A private individual who attempts by gift or will to make property inheritable otherwise than the law directs is assuming to legislate, and the gift must fail, and the inheritance take place as the law directs.—(*b.*) With reference to transfers by gift, a benignant construction is to be used: the real meaning shall be enforced to the extent and in the form which the law allows.—(*c.*) All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such.—Consequently, by Hindu law no person can succeed under gift or will as heir to estates described in the terms which in English law would designate estates tail.—But, *quære*, under such gift or will, whether persons described as heirs in tail are sufficiently designated to take successively by way of gift, subject to defined restrictions; or whether the first taker is to have an estate of inheritance according to law, the residue being rejected as an attempt to impose fetters inconsistent with the law.—By Hindu law, as a general principle, a person capable of taking under gift or will must either in fact or in contemplation of law be in existence at the time when the gift takes effect, *i.e.*, in the case of a will, at the death of the testator. In the latter term are included children in embryo and children subsequently adopted. There may be exceptional cases of provisions by way of contract, or of conditional gift on marriage, or other family provision.—Trusts of various kinds, including implied trusts, have been recognised and acted on amongst Hindus in many cases; and in cases of a provision for charity, or for other beneficient objects, the creation of a trust is practically necessary. The distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one, for the convenience and benefit of another. —But a testator cannot, under the guise of an unnecessary trust of inheritance, indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust. Trusts so created can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognises, and after the determination of those interests the beneficial interest in the residue of the property remains in the person who but for the will would lawfully be entitled thereto.—A Hindu may by gift or will create an estate for life.—Where a testator left the residue of his estate to *A.* for life, with subsequent void limitations, as, for instance in favour of persons unborn at the death of the testator, and limitations describing an inheritance in tail male; and at the same time it appeared that no estate of inheritance other than the void estate in tail male could be read or deduced from the will: —*Held*, that the estates of inheritance and estates or interests subsequent to *A.*'s life interest failed. Limitations over on "failure or determination" of prior estates of inheritance were *held* to be intended to follow the creation of those estates, and consequently to be of no effect when it appeared that such prior estates were illegal and invalid.—Where the will directed the surplus of the personalty, after all annuities and legacies had fallen in and been satisfied, should be paid to the person or persons who for the time being should, under the limitations and directions therein contained, be entitled to the beneficial enjoyment of the real property:—*Held*, that the tenant for life was entitled to the interest on such personalty as well after as before the falling in and satisfaction of the legacies and annuities; and that the intention was to establish a trust fund, the interest whereof should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the *corpus* remaining otherwise undisposed of.—Where all existing parties interested under a will are in Court, a declaration as to future rights after the determination of the life interest may be made.—*Lady Langdale* v. *Briggs* (8 D. M. & G. 391) distinguished. JUTTENDROMOHUN TAGORE *v.* GANENDROMOHUN TAGORE. GANENDROMOHUN TAGORE *v.* JUTTENDROMOHOHUN TAGORE - - - - - 47

3. ——.] It is settled law that a man cannot, either by himself or by his widow acting under authority delegated by him, while he has an adopted son living, adopt another son.—*Rungama* v. *Atchama* (4 Moore's Ind. Ap. Ca. 1) approved. —A Plaintiff who has alleged and failed to prove a title as heir to an invalidly adopted son, cannot in appeal set up a totally new case as heir to the alleged adoptive father. GOPEE LALL *v.* MUSSAMUT SREE CHUNDRAOLEE BUHOOJEE - - 131

HINDU WIDOW.] A Hindu widow is not bound to reside with the relatives of her deceased husband; and she does not forfeit her right to property or maintenance merely on account of her going and residing with her family or leaving her husband's residence for any other cause than unchaste or improper purposes.—Arrears of maintenance may be awarded to a widow as well as a decree for future maintenance. RAJAH PIRTHEE SINGH *v.* RANEE RAJ KOWER - - 203

—— : *See* OUDH ESTATES ACT. 1.

HINDU WIDOW NOT BOUND TO RESIDE WITH HER HUSBAND'S FAMILY: *See* HINDU WIDOW.

INDIAN COUNCILS ACT, 1861: *See* ACT OF STATE. 2.

INHERITANCE: *See* HINDU LAW. 2.

—— : *See* MAHOMEDAN LAW.

IKRARNAMAH: *See* RIPARIAN PROPRIETORS.

IMPARTIBLE ZEMINDARY: *See* HINDU LAW. 1

JAIDAD TENURES: *See* ACT OF STATE.

JURISDICTION: *See* ACT OF STATE.

——: *See* ACT OF STATE. 2.

——: *See* DECLARATORY DECREE.

LIGHT AND AIR: *See* PRESCRIPTION.

LIMITATION OF SUITS ACT, XIV. OF 1859: *See* DIVORCE À VINCULO.

LIMITATION: *See* MAHOMEDAN LAW.

MAHOMEDAN LAW.] Prompt dower is exigible immediately, but limitation does not begin to run until demand has been made, or until the marriage is dissolved by death or otherwise. MUSSUMUT MULLEEKA *v.* MUSSUMUT JUMEELA - 135

2. ——.] A ceremony of marriage was performed between Mahomedan minors in the Fazolee (nominal) form; the girl's father being dead and the marriage being contracted by her paternal grandmother. Thereafter the girl died, having attained the age of puberty, without ever meeting or communicating with her husband, and without ever expressing in any way assent to or dissent from the marriage:—*Held*, that by the law of the Sheeah sect which governed the case, the marriage, since the assent of the girl after attaining puberty was not shewn, was imperfect from the want of the necessary ratification, and could not create any rights or obligations.—Though by the law of the Soonnees the option of dissent must be declared by the girl as soon as puberty is developed; yet by the doctrine of the Sheeahs the matter ought to be propounded to her so that she may advisedly give or withhold her assent.—*Held*, further, that under such circumstances the paternal grandmother of the girl was not entitled to inherit her estate; that the mother as her surviving parent was entitled to a third share thereof, and that the Appellants her half-brothers and sisters were entitled (without prejudice to any claims by third parties) to the residue. NEWAB MULKA JEHAN SAHIBA *v.* MAHOMED USHKURREE KHAN - - - - - - - 192

MAINTENANCE: *See* HINDU WIDOW.

MARRIAGE: *See* MAHOMEDAN LAW.

OUDH ESTATES ACT, 1869.] In a suit against the Respondent pending the regular settlement of talook *Sessendee* to establish Plaintiff's right to a direct settlement with her of four villages, and of a one-third share in seven others out of the twenty-six villages of which the talook was composed; it appeared that the Respondent had before judgment obtained a sunnud of the whole talook, his name being entered in the second schedule to Act I. of 1869, and further that he had admitted himself to be trustee for the Plaintiff as respects the said one-third share of seven villages. It also appeared that the Plaintiff was entitled to a sub-settlement of the said four villages:—*Held* (1), that the Plaintiff could not establish talookdary rights, for, having no interest in many of the villages, in order to make her a talookdar it would be necessary to reform the sunnud and break up the existing settlement and

OUDH ESTATES ACT, 1869—*continued.*

resettle the estate in three different portions.—*Quære*, whether the sunnud could be reformed after Act I. of 1869, without a special Act of the Legislature.—(2) The Plaintiff could not under the summary settlement and the order of the 10th of October, 1859, acquire proprietary rights as against the Respondent, who was solo hereditary proprietor of the talook before the summary settlement, and whose rights were reserved under the Proclamation.—(3) The summary settlement not having been made with the Plaintiff *as talookdar*, neither it nor the order of 1859 conferred talookdary rights upon her.—*Held*, lastly, that the Plaintiff was entitled to a Hindu widow's estate of inheritance in the said four villages, and in one-third share of the profits of the said seven villages, and to have a sub-settlement of the four villages on terms of paying to the talookdar the government demand *plus* 10 per cent.—*Quære*, whether the effect of the letter of October, 1859, and the subsequent legislation is to relieve a Hindu widow, though a talookdar, from the disabilities imposed upon her by the general law. WIDOW OF SHUNKER SAHAI *v.* RAJAH KASHI PERSHAD - - - - - - - 220

2. ——.] In a suit brought in 1867 to establish Plaintiff's right to a talookdary in *Oudh*, as grandmother and heiress to a deceased infant rajah, with whom a summary and temporary settlement thereof had been made; it appeared that the talook had been, after the death of the infant rajah, and before the order of the 10th of October, 1859, resumed by the Government:—*Held*, that the Plaintiff as heir of a talookdar who had been permitted to engage for the revenue, but who had died before the letter of the 10th of October, 1859, was not entitled to the permanent hereditary and transferable proprietary right described thereby, but which had never vested in the deceased Rajah —Act I. of 1869 did not apply to the case.—RANEE OF CHILLAREE *v.* GOVERNMENT OF INDIA - - - - - - 237

PARTNERSHIP.] Agreement in writing entered into between *W. & Co.*, British merchants, carrying on business at *Calcutta* with a Hindu Rajah, by which, in consideration of moneys already advanced, and which might be thereafter advanced by the Rajah to them, they agreed to carry on the business subject to the control of the Rajah in several particulars; stipulating that the Rajah should receive a commission of twenty per cent. on all profits made by the firm, until the whole amount of the debt due to him should be paid off, with twelve per cent. interest upon all cash advances which had been, or might be thereafter, made by him to the firm. Further advances having been made by the Rajah to the firm, *W. & Co.* executed to him a mortgage of certain tea plantations, to secure the then amount of his advances, and the Rajah by a deed released his right to commission and interest under the original agreement between them. No proceeds of the business were ever received by the Rajah, and though he was credited in the books of the firm with a considerable sum, that sum was never received by him, and was afterwards written back in the books of the firm. The Rajah did not

PARTNERSHIP—*continued.*

interfere or exercise any such control in the business as to make him an ostensible partner in the firm :—*Held*, having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of a business made the participant liable as a partner to third parties, and looking at the whole scope of the agreement, the primary object was to give security to the Rajah as a creditor of the firm of *W. & Co.*, and that the participation given him in the net profits of the business was not sufficient to establish a partnership between *W. & Co.* and the Rajah, as regarded third parties. —Although a right to participate in the profits of a trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption, not of law, but of fact, be enforced; yet, whether that relation does or does not exist, must depend on the real intention and contract of the parties.—The cases of *Cox* v. *Hickman* (8 H. L. C. 268) and *Bullen* v. *Sharp* (Law Rep. 1 C. P. 86) referred to and acted on. —In the absence of any law or established custom existing in *India* in respect to partnership transactions, the law of *England* is to be resorted to for principles and rules to guide the Courts. At the same time the usages of trade, and habits of business of the Indian community, so far as they may be peculiar or differ from those in *England*, are to be taken into consideration. MOLLWO, MARCH, & Co. *v.* THE COURT OF WARDS - 86

PRACTICE : *See* DIVORCE À VINCULO.

——: *See* HINDU LAW. 3.

PRESCRIPTION.] In a suit for an injunction praying that the Defendants might be restrained from proceeding with a certain building, and that a portion of it might be taken down, which had the effect of obstructing the light which the Plaintiffs alleged they were entitled to have through their windows, it appeared that the origin of the alleged right had accrued more than twenty years previously, but that before the expiration of twenty years therefrom the owner of the servient tenement commenced the obstruction complained of:—*Held*, that as 2 & 3 Will. 4, c. 71, did not apply, the case must be governed by the English law previous to that enactment; and that as enjoyment for twenty years with the acquiescence of the owner of the servient tenement was not proved, and could not, under the circumstances, be presumed, the suit must be dismissed.—*Quære*, whether acquiescence by the owner of the servient tenement may be presumed from proof of actual knowledge of the obstruction on the part of his agent who collected his rents and fixed their amount. ELLIOTT *v.* BHOOBUN MOHUN BONNERJEE [175

PRIMOGENITURE : *See* HINDU LAW. 1.

PROMPT DOWER : *See* MAHOMEDAN LAW.

PURCHASER FOR VALUE WITHOUT NOTICE : *See* VENDOR AND PURCHASER.

QUALIFICATION OF RULE WITH RESPECT TO CONCURRENT JUDGMENTS ON A QUESTION OF FACT : *See* DIVORCE À VINCULO.

REG. XLIV. OF 1793 : *See* GHATWALI TENURES.

RES JUDICATA.] In a suit by a testator's adopted son and heir-at-law to obtain possession of the whole estate of the deceased, on the ground that both the inherited property and the property acquired from the income thereof were ancestral, and could not under the Mitakshara be disposed of by will, it was pleaded that it had been decided in a former suit between the same parties that the testator had the power to devise by will such real property as he had acquired out of the income of his ancestral property.—It appeared that in that former suit the Plaintiff sought to cancel various alienations by the testator; that the effect of the pleadings and of the memorandum of appeal therein was to put in issue *inter alia* whether the testator had power to make any of the devises of realty contained in the will; but that the only issue actually raised relating to the will was whether or not it had been assented to by the Plaintiff:—*Held*, that notwithstanding that the said issue embraced but a portion of the controversy between the parties, inasmuch as it plainly appeared that the question of the validity of the whole will was raised by the parties and submitted to the Court as above stated, the judgment thereon was binding.—The term "cause of action" in sect. 2 of Act VIII. of 1859 is to be construed with reference rather to the substance than to the form of action.—Sect. 2 does not prevent the operation of the general law relating to *res judicata*, which is, that when a question has been necessarily decided in effect, though not in express terms, between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form.—*Gregory* v. *Molesworth* (3 Atk. 626) approved. SOORJOMONEE DAYEE *v.* SUDDANUND MOHAPATTER - - - 212

RESUMPTION : *See* ACT OF STATE.

——: *See* GHATWALI TENURES.

RESUMPTION ORDER OF OCT. 10, 1859 : *See* OUDH ESTATES ACT, 1869. 2.

RIPARIAN PROPRIETORS.] There may be a fluctuating boundary (viz., the course of a river) between two zillahs, which by no means affects the rights of landed proprietors.—A custom to the effect that where land which had once been alluvial lies between two branches of a river, or between two rivers, and from time to time the water shifts, so that alternately one of these channels is deep and the other is fordable, then the whole of such intermediate land belongs to the landowner on the side of the channel which at any given time is fordable—in short, that the ownership and right of possession of the whole intermediate tract of land shift with the volume of the water, always attaching to the riparian proprietor on the side of the channel which happens for the time being to be fordable—must be established by very clear and distinct evidence, since the operation of such a custom must be to render the rights of property fluctuating and precarious. —An ikarnamah between two zemindars as to the mode of determining the boundaries of their estates according as a river becomes fordable on the side of one or other of such estates, whatever may be its effect as between the parties thereto, is not a covenant which will run with the land into

RIPARIAN PROPRIETORS—*continued.*
the hands of any possessor of it by any title. BABOO BISSESSURNATH *v.* MAHARAJAH MOHESSUR BUX SINGH BAHADOOR - - - 34

SECOND ADOPTION: *See* HINDU LAW. 3.

SENIORITY ACCORDING TO BIRTH AND NOT OF MARRIAGE OF WIVES: *See* HINDU LAW. 1.

SHEEAHS: *See* MAHOMEDAN LAW.

SUIT TO DECLARE DEEDS OF GIFT AND ACCEPTANCE OF A CHILD IN ADOPTION, NULL AND VOID: *See* DECLARATORY DECREE.

SUNNUD: *See* OUDH ESTATES ACT, 1869. 1.

TALOOKDAR: *See* OUDH ESTATES ACT. 2.

TEMPORARY SETTLEMENT: *See* OUDH ESTATES ACT. 2.

VALIDITY OF TRUSTS: *See* HINDU LAW. 2.

VENDOR AND PURCHASER.] It is a principle of natural equity which must be universally applicable that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by shewing either that he had direct notice, or something which amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it. RAMCOOMAR KOONDOO *v.* MACQUEEN AND ANOTHER - - - 40

VOID LIMITATIONS: *See* HINDU LAW. 2.

WILLS: *See* HINDU LAW. 2.

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